

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA,	)	Criminal Action
	)	No. 21-193
vs.	)	
	)	
GREG RUBENACKER,	)	May 26, 2022
	)	10:00 a.m.
Defendant.	)	Washington, D.C.
	)	

\* \* \* \* \*

**TRANSCRIPT OF SENTENCING HEARING  
BEFORE THE HONORABLE BERYL A. HOWELL,  
UNITED STATES DISTRICT COURT CHIEF JUDGE**

**APPEARANCES:**

FOR THE GOVERNMENT:

TROY EDWARDS, JR.  
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ALSO PRESENT: Christine Schuck, Pretrial Officer  
Crystal Lustig, U.S. Probation

Court Reporter: Elizabeth Saint-Loth, RPR, FCRR  
Official Court Reporter

Proceedings reported by machine shorthand, transcript  
produced by computer-aided transcription.

**P R O C E E D I N G S**

THE COURTROOM DEPUTY: Matter before the Court,  
Criminal Case No. 21-193, United States of America versus  
Greg Rubenacker.

Your Honor, before counsel comes up, we have  
Probation Officer Crystal Lustig joining us via video and  
Pretrial Agent Christine Schuck via telephone.

Counsel, please come forward and state your names  
for the record, starting with the government.

MR. EDWARDS: Good morning, Your Honor.

I am not sure about your preference on masks.

THE COURT: Are you vaccinated and boosted?

MR. EDWARDS: Yes, Your Honor.

THE COURT: Then you may take off your mask.

MR. EDWARDS: Thank you.

Good morning, Your Honor.

Assistant United States Attorney Troy Edwards for  
the government. Along with me, at counsel's table, is  
Assistant United States Attorney Jacqueline Schesnol.

THE COURT: Okay. And are both of you going to be  
speaking this morning or just one of you?

MR. EDWARDS: No, Your Honor. Just me.

Thank you.

THE COURT: Okay. Good. Thank you.

And, Mr. Edwards, are you an AUSA here in D.C. or

1 are you from someplace else?

2 MR. EDWARDS: Here in D.C., Your Honor.

3 THE COURT: Here in D.C. Okay. I don't think you  
4 have appeared before me before.

5 MR. EDWARDS: Not -- I have had a couple of the  
6 status hearings for this case; but this is my only case  
7 before you so far.

8 THE COURT: All right. Thank you.

9 For the defense.

10 MR. MATERA: Good morning, Your Honor.

11 For Mr. Rubenacker, Michaelangelo Matera.

12 THE COURT: Yes. Good morning, Mr. Matera.

13 Good morning, Mr. Rubenacker.

14 THE DEFENDANT: Good morning.

15 THE COURT: Mr. Rubenacker, are you vaccinated?

16 THE DEFENDANT: No, I am not.

17 THE COURT: Okay. Then you will keep your mask on  
18 at all times.

19 (Whereupon, the Court and staff confer.)

20 THE COURT: This is not my normal courtroom. They  
21 are doing technical work on my audio system. Yes. So it  
22 seems like a lot of the courtrooms need technical work. All  
23 right. So we are just going to -- this is what I am going  
24 to do. I am going to proceed. But ask John Cramer, our  
25 technical guru, to please come up to fix that.

1                   (Whereupon, technical difficulties were addressed.)

2                   THE COURT: Well, let me just -- again, so we're  
3 here this morning for the sentencing of the defendant, Greg  
4 Rubenacker, who has pleaded guilty to all ten charges,  
5 Counts 1 through 10, in the superseding indictment against  
6 him.

7                   The sentencing hearing is in person, but the  
8 public access line is being made available for persons to  
9 listen to these proceedings remotely. With the increased  
10 transmission of COVID in this area, we are continuing to try  
11 to keep the number of people having to come to the  
12 courthouse down, and allowing the public access line to work  
13 enables people to listen to this remotely rather than being  
14 physically present in the courtroom.

15                  Anyone listening to the sentencing hearing over  
16 the public telephone conference line is reminded that, under  
17 my Standing Order 20-20, recording and rebroadcasting of  
18 court proceedings, including those held by  
19 videoconference -- which this is not -- is strictly  
20 prohibited. Violation of these prohibitions may result in  
21 sanctions, including removal of court-issued media  
22 credentials, restricted or denial of entry to future  
23 hearings, or any other sanctions deemed necessary by the  
24 presiding judge.

25                  All right. So as I start every sentencing

1 hearing, I am going to start this one, which is reviewing  
2 all of the materials that I have read in connection with  
3 Mr. Rubenacker's sentencing.

4 So I have reviewed the probation office's  
5 presentence investigation report docketed at ECF 52; the  
6 probation office's sentencing recommendation docketed at  
7 ECF 53.

8 I have also reviewed the following documents  
9 submitted by counsel in advance of the hearing: The  
10 sentencing memorandum and supplemental sentencing memorandum  
11 submitted by the government docketed at ECFs 56 and 59.

12 I have also reviewed the sentencing --

13 (Whereupon, the proceeding pauses.)

14 THE COURT: Are we all good?

15 IT TECHNICIAN: We're good.

16 THE COURT: Thank you so much.

17 (Whereupon, the Court and staff confer.)

18 THE COURT: All right. Continuing on my list of  
19 things that I have reviewed -- there have been a lot of  
20 papers submitted in connection with the sentencing.

21 I have also reviewed the sentencing memorandum --  
22 memoranda submitted by the defendant docketed at ECF 55, and  
23 the supplemental sentencing memorandum submitted last Friday  
24 docketed at -- the original one was ECF 55; the second one  
25 was ECF 62.

1 I have also reviewed all of the letters submitted  
2 by Mr. Rubenacker himself, and his family, and friends --  
3 and from a mental health counselor; they were also all --  
4 also docketed at ECF 55.

5 I have reviewed the 20 videos and 3 photo stills  
6 and screenshots submitted by the government in aid of  
7 sentencing, and referenced in the government's notices at  
8 ECF 56, 42, and 60.

9 And I have also reviewed the victim impact  
10 statement that was submitted by Officer Eugene Goodman that  
11 was submitted last night, along with a motion to file the  
12 statement under seal; and that was all docketed at ECF 64.

13 And I know, Mr. Matera, you have an objection to  
14 that which I will get to in just a minute.

15 But does the government have all of those  
16 documents?

17 MR. EDWARDS: Yes, Your Honor.

18 THE COURT: Mr. Matera, do you have all of those  
19 documents?

20 MR. MATERA: I do, Your Honor.

21 THE COURT: All right. So before I turn to your  
22 objection to all of the documents I have considered in  
23 connection with sentencing, let me just review with  
24 Mr. Rubenacker how this sentencing proceeding will go  
25 forward this morning.

1 I do like to review this for defendants,  
2 particularly for those who have no criminal history. You  
3 have never gone through this before, so I know this is a new  
4 experience for you, Mr. Rubenacker. And, also, your family  
5 members who may either be listening or present in the  
6 courtroom, I don't know -- there are a number of people  
7 here, I don't know who they are.

8 MR. MATERA: They are not. His parents are in  
9 their mid-80s, but they are listening.

10 THE COURT: I see. So let me just tell you how my  
11 sentencing proceedings and hearings are structured so you  
12 know what is going to be coming up.

13 The first step of the sentencing hearing is to  
14 determine whether the government or you or your counsel,  
15 Mr. Rubenacker, has any objections to the factual portions  
16 of the presentence investigation report; and if there are  
17 any such objections, I will resolve them.

18 At the second step of the hearing, I will  
19 determine how the advisory guidelines apply in your case,  
20 and what the recommended sentencing range is, based upon  
21 your criminal history and considering any mitigating or  
22 aggravating factors. This is going to be a fairly lengthy  
23 part of this sentencing hearing because your counsel has  
24 raised, on your behalf, a number of objections to the -- how  
25 the guidelines apply in your case.

1           The third step is to hear from the government and  
2           then from your counsel, Mr. Rubenacker; and then, lastly,  
3           from you if you wish to speak to me directly about  
4           sentencing in the case.

5           And then the last step is where I will explain the  
6           reasons for the sentence I will impose, and then I will  
7           impose sentence.

8           Do you have any questions about what is going to  
9           be coming up next, Mr. Rubenacker?

10          THE DEFENDANT: No, Your Honor.

11          THE COURT: All right.

12          So let's just take up, as an initial matter, the  
13          defendant's objection to -- as I understand it, Officer  
14          Goodman's statement that was submitted yesterday evening. I  
15          don't know precisely at what time, but I didn't read it  
16          until this morning.

17          And I understand that Mr. Matera has no objection  
18          to the government's motion to seal that victim impact  
19          statement, but only to have it considered a victim impact  
20          statement.

21          Do I understand that correctly, Mr. Matera?

22          MR. MATERA: That's correct, Your Honor.

23          THE COURT: All right. So why don't you step  
24          forward, and then let me hear what you have to say about  
25          that.



1 MR. MATERA: Thank you, Your Honor.

2 Initially, we were provided this statement at,  
3 approximately, 9:45 p.m. last night. As Your Honor is well  
4 aware, this is a case that has been pending -- a matter that  
5 has been pending since January 6th. Why we're continuously  
6 getting things at the very last minute is concerning. Why  
7 we were getting it from an officer that basically -- the  
8 plea was taken -- I forget the exact day, but in February.  
9 In the presentence report, it's indicated that it's  
10 requested from the government whether or not they had any  
11 victim information; the government didn't provide any.

12 The government now, at the last minute, comes up  
13 with this statement. And if you review -- I am sure Your  
14 Honor has, obviously. But if you review the statement, it's  
15 very questionable as to how much it even has to do with the  
16 actions of Mr. Rubenacker.

17 It talks as much about some kind of difficulties  
18 that other people are having other than Officer Goodman. It  
19 talks about an individual whose office was broken into, and  
20 what -- the impact that had on that individual, which -- if  
21 that individual wanted to talk, then that individual, by all  
22 means, should have. But Mr. Rubenacker had nothing to do  
23 with the taking of that information.

24 We also have a statement that is -- it's an  
25 unsigned statement. I am not doubting that it's from

1 Officer Goodman, but it's an unsigned statement. And it  
2 talks about things that -- when I asked the government last  
3 night -- Mr. Edwards was kind enough to give me a call and  
4 give me the heads up that they were going to be submitting  
5 this to Your Honor and did send me a copy.

6 I said: Well, why? Why are we waiting until 9:45  
7 to -- I know that's when he got it, I am not -- this is  
8 nothing against Mr. Edwards.

9 Why are we waiting until 9:45? Why did this  
10 victim -- if he wanted to be heard, not come forward sooner?  
11 And the response that I got was that: Well, he was very  
12 concerned -- sometimes victims are afraid to come forward  
13 and didn't want to tell his story.

14 Well, I have to question that statement because I  
15 am not sure if Your Honor is aware of this or not -- you may  
16 very well be, as this case has obviously gotten a tremendous  
17 amount of publicity. Officer Goodman gave a full podcast  
18 interview in January of this year.

19 So to say that he somehow didn't want to come  
20 forward because he was concerned, it's just -- I can't --  
21 the defendant cannot accept that position, in light of the  
22 fact that he gave an interview that not only was broadcast  
23 on the podcast, but was picked up by every major media  
24 outlet, and reported throughout the country.

25 There is -- also, the government has taken the

1 position in their objections to the presentence report  
2 something that --

3 Is my time up?

4 (Proceeding pauses, timer interruption.)

5 MR. EDWARDS: I apologize; it's the government  
6 laptop.

7 MR. MATERA: Okay. I thought I was getting --

8 THE COURT: I'm listening to you, Mr. Matera, not  
9 the bizarre noises.

10 MR. MATERA: Thank you, Judge. That's okay.

11 So the government, in their objections -- which we  
12 joined with, in certain of their objections to the  
13 presentence report -- has indicated that the victim in this  
14 particular case -- other than the second portion --  
15 obviously, in this case, Your Honor is well aware, we have  
16 two separate incidents; we have the one during the first  
17 entry into the Capitol Building, and we have the one during  
18 the second entry. The second entry had nothing to do with  
19 Officer Goodman, that's where the assault charge comes from.

20 As far as the obstruction charge, the government  
21 has indicated in their objection that certain points for  
22 official victims should not be submitted because of the fact  
23 that the government was the victim. Again, something that  
24 we joined in.

25 If the government's the victim, then how is

1 Officer Goodman now providing a statement that is his  
2 position as an individual -- I don't think that it's proper.

3 I don't think the fact that it is -- was given  
4 over at this very late hour, when it should have been made  
5 part of the presentence report when requested by  
6 probation -- I think there is -- also, the law is very clear  
7 that the harm must have a close proximity to the conduct of  
8 the defendant. I can't tell from this statement that it has  
9 much to do with the specific conduct of the defendant.

10 It's also clear, as I reviewed it last night --  
11 and obviously had to scramble at 9:45 to find Officer  
12 Goodman's podcast -- he contradicts himself from what he  
13 says in this victim impact statement to some of the  
14 information that he gave on the podcast as to when he knew  
15 and what he knew about people in the building.

16 Judge, for all these reasons -- and most  
17 specifically for the late disclosure -- it is the  
18 defendant's position that it should not be made part of the  
19 record.

20 THE COURT: All right. Well, let me just ask you  
21 about that. Because the rules are pretty clear, this is a  
22 victim impact statement under Rule 32, as well as Rule 60.  
23 I have to take it. So timing could be better, but I don't  
24 think I am left any wiggle room about whether to accept a  
25 victim impact statement under the applicable Rules of

1 Criminal Procedure.

2 Would you agree with that?

3 MR. MATERA: I would agree with that.

4 THE COURT: So I hear you, but too bad, so sad for  
5 you, in some ways.

6 MR. MATERA: I get it.

7 THE COURT: I'm required under the Federal Rules  
8 of Criminal Procedure to look at victim impact statements.

9 You say it's unsigned. I look here -- to the  
10 government -- about why it's unsigned. You know, in days of  
11 electronic transmissions of things, not everybody has fancy  
12 digital signatures like us judges. And, you know, I think  
13 Officer Goodman, with his role protecting the Capitol, is  
14 probably more often on his feet rather than sitting at his  
15 computer.

16 MR. MATERA: I would imagine so.

17 THE COURT: So that may be the simple explanation,  
18 but I will ask about that.

19 With respect to your -- as I understand your other  
20 objection, I think you're questioning whether he qualifies  
21 as a victim here, is that also --

22 MR. MATERA: Correct.

23 THE COURT: Am I understanding your objection  
24 correctly to that?

25 MR. MATERA: That's correct. Whether or not he

1       qualifies as a victim to properly give a statement in this  
2       particular situation.

3               I have no doubt that Officer Goodman may be a  
4       victim as to some of the other issues that he raises. He  
5       talks about the fact that he has received death threats, and  
6       things like that. Again, it has nothing to do -- there is  
7       no allegation that Mr. Rubenacker had anything to do with  
8       that; certainly, he did not. So to the extent that he is  
9       talking about things that have absolutely no relation to  
10      this particular case, yes, that is part of my objection as  
11      well.

12             THE COURT: Right. And as I understood, you  
13      also -- his letter, as he describes it, talks about what  
14      happened to him that day.

15             But in terms of his references to people having  
16      nightmares, being -- having fear continuing to work in the  
17      Capitol Building; having fear of the public coming into the  
18      Capitol Building and whether or not they, too, are going to  
19      turn violent and come -- turn into a riot.

20             I think your description is accurate, that he is  
21      not talking about himself in those; he is talking about his  
22      coworkers who continue to work in the Capitol Building.  
23      So -- and based on that, it's your view that he doesn't  
24      really describe himself as a victim; is that right?

25             MR. MATERA: Well, he's not -- for him to be here

1 and present this statement that talks about his perception  
2 of harm that other people have sustained -- those other  
3 people chose not to give a victim impact statement. So  
4 without having -- and I am -- certainly am not asking for  
5 Officer Goodman to be here so I can question him about his  
6 perceptions of other people. But to have him submit a  
7 letter talking about what other people may or may not -- how  
8 do we know?

9 How do we know if that's an accurate impression  
10 that he has about what other individuals may or may not have  
11 sustained?

12 THE COURT: So -- but, at the same time, I think  
13 you would agree that the district court has very broad  
14 discretion to consider evidence at sentencing under  
15 18 U.S.C. Section 3661, which, basically, says that there  
16 will be no limitation placed on the information presented at  
17 a sentencing hearing.

18 MR. MATERA: Provided that it is related to the  
19 incident itself, yes; I do agree with that, Your Honor.

20 THE COURT: And let me understand that because --  
21 for the victim impact statement, it's really -- under  
22 Section 3771, which defines a crime victim very broadly to  
23 include: A person directly and proximately harmed as a  
24 result of the commission of a federal offense; that's under  
25 18 U.S.C. Section 3771(e).

1           So as I was understanding your teasing of this  
2       defendant's offense conduct -- the two different stages  
3       related to his two illegal entries into the Capitol  
4       Building; your view is that his -- the offense with which  
5       this defendant was charged with respect to his first illegal  
6       entry was obstruction and, therefore, Officer Goodman could  
7       not be a victim of that offense conduct because the  
8       government was the victim of that obstruction?

9           MR. MATERA: Correct.

10          THE COURT: Am I understanding your rationale  
11       correctly?

12          MR. MATERA: Yes. That is the position that the  
13       government has taken in their objection to the presentence  
14       report, was that the victim was the government; and the  
15       victim was not an individual. And we share in that  
16       position.

17          And as Your Honor is well aware, the government --  
18       other than for purposes of restitution, the government  
19       cannot be a victim; so, yes, that is --

20          THE COURT: What if I don't accept your slicing  
21       and dicing of the offense conduct in just such two separate  
22       clear incidents, and that the obstructive conduct that day  
23       involved both illegal entries into the Capitol Building?

24          MR. MATERA: Understood.

25          THE COURT: And so with -- if I view the offense



1       conduct in a more holistic manner than you do -- and you  
2       have raised that argument in other contexts that I will get  
3       into shortly -- why couldn't Mr. -- Officer Goodman be  
4       considered a victim of the overall conduct that this  
5       defendant's actions, on January 6th, contributed, as a  
6       collective force as a member of this riot, to proximately  
7       cause terror in the hearts of the police officers who were  
8       overwhelmed that day?

9               MR. MATERA: Judge, I do understand the Court's  
10       position. Again, for the reasons that I've stated, we're  
11       still opposed to the statement coming in; but I certainly do  
12       understand the Court's position on that issue.

13              THE COURT: All right. Thank you, Mr. Matera.  
14       Mr. Edwards.

15              MR. EDWARDS: Thank you.

16              THE COURT: Do you want to respond?

17              MR. EDWARDS: Yes, Your Honor. Just a few points.

18              So I understand Mr. Rubenacker's points to be a  
19       few: One is timeliness; two is relevance; and three, I  
20       think, is whether or not Officer Goodman is a crime victim,  
21       as it relates to the Crime Victims' Rights Act. So I will  
22       take those in turn.

23              So as to timeliness, Your Honor, the officer could  
24       have walked into this courtroom today, under the Crime  
25       Victims' Rights Act, and provided a victim impact statement.

1           The government and the Court both have  
2       responsibilities to ensure that the rights of victims, as  
3       listed as 3771, are protected, and having an opportunity to  
4       be heard is one of them under (a) -- I believe (1) or (2) --  
5       and sentencing is one of those proceedings.

6           So it sounds like the Court had a couple of  
7       questions that were related to the government's point.  
8       Unless Your Honor has other questions, timeliness is not an  
9       issue as to whether or not this victim statement should be  
10      part of the record.

11          Maybe it's a question as to whether the defendant  
12      would like a continuance? I don't hear the defendant to be  
13      saying that; so I don't think that's relevant as to whether  
14      it comes in.

15          As to relevance, Your Honor, it sounds like there  
16      are two arguments; one is the substance of what he wrote and  
17      about his interactions and experiences that day; I'd like to  
18      not go into too much information given that it's under seal.  
19      And two is how relevant --

20          THE COURT: But I have to say, it is -- Officer  
21      Goodman's statement has been placed under seal. But to the  
22      extent that it is necessary for either of the parties to  
23      explain their reasoning in making arguments, it will be  
24      unsealed.

25          MR. EDWARDS: Yes, Your Honor.

1           The second relevance argument seems to be why  
2       other people's emotions and experiences were relevant; so  
3       both of those are relevant.

4           One, there is no limitation in the Crime Victims'  
5       Rights Act, that the defendant is pointing to, to say:  
6       Those things can't come in as part of the record. I think  
7       that's important.

8           But first, Officer Goodman --

9           THE COURT: Usually -- I mean, Mr. Matera is  
10      right. Usually, a victim impact statement is expressed by  
11      the victim about what the victim's own harm is as opposed to  
12      the harm of others, unless the victim feeling the harm is  
13      incompetent in some way or a minor.

14          MR. EDWARDS: So I read the letter to be  
15      explaining other people coming to the officer to relay to  
16      him their emotional and physical harm from that day; that,  
17      in itself, is still a harm to this victim because this is a  
18      consequence -- maybe one or two orbits out from January 6th,  
19      from the direct harm -- certainly, proximately there are  
20      people who come to him and relay to him their feelings,  
21      their injuries, their consequences from January 6th; that's  
22      still some pain that this victim has to carry and shoulder  
23      continuing to this day. So that's perfectly relevant for  
24      the Court to understand how far the day of January 6th has  
25      traveled for these officers and for the people around them.

1           THE COURT: And let me just get some sort of more  
2 technical issues out of the way.

3           One, why was the letter unsigned?

4           MR. EDWARDS: Yes, Your Honor. As Mr. Matera  
5 referred, the government received this late last night.

6           My understanding is the officer has been working  
7 constant shifts. I have actually had some difficulty  
8 getting a hold of him, to be honest, throughout the last few  
9 weeks; and I think that's primarily because he is on his  
10 feet doing his job in the Capitol Building. I will admit, I  
11 did not ask him if he had a digital signature to draw.

12           Given the hour, I just took it and ran to defense  
13 counsel and the Court, and tried to do as much as I could.

14           THE COURT: All right. So that's my first  
15 question.

16           My second question is: Is this the first time  
17 Officer Goodman has submitted a victim impact statement?

18           MR. EDWARDS: To the government's awareness, yes.

19           As far as Mr. Matera's points, I am happy to  
20 address them about other statements, maybe in the media; I  
21 can address that. But, yes, as far as a victim impact  
22 statement, yes, this is the first time.

23           THE COURT: And Officer Goodman's letter talks  
24 about how he was on duty starting at 5 a.m. that day, and he  
25 was in multiple areas of the Capitol Building, not just the

1 incident where he was chased up the stairs by the mob right  
2 outside the Senate Chamber, up into the Ohio Clock Corridor.

3 Is it anticipated that Officer Goodman's victim  
4 impact statement is going to be submitted in connection with  
5 other January 6th cases involving defendants arrested at the  
6 other areas of the Capitol Building where he reviews his  
7 observations of what was going on in those other areas?

8 MR. EDWARDS: Yes, Your Honor. I can't answer  
9 that specific question as to whether this material will be  
10 submitted in any public forum. At this point --

11 THE COURT: Not "public." As a victim impact  
12 statement in other January 6th cases?

13 MR. EDWARDS: I see. At this point, I don't know.

14 I think Officer Goodman and the government on this  
15 case has had a conversation as it relates to this case. We  
16 did not have a conversation if he would replicate that  
17 statement for other trials. That may happen.

18 THE COURT: Okay. And given the fact that Officer  
19 Goodman has made public statements about what he observed  
20 and experienced on January 6th -- he may have testified  
21 publicly at a congressional hearing, I am not sure; but, as  
22 Mr. Matera said, there was a podcast.

23 Does the entire victim impact statement have to be  
24 put under seal?

25 MR. EDWARDS: Yes, Your Honor.

1 I see those as two different things.

2 So this podcast in January -- admittedly, the  
3 government has not listened to the whole -- at least this  
4 attorney has not listened to the whole podcast. But whether  
5 a victim provides a statement in January is very different  
6 about what he may write as it relates to what the Court  
7 should consider about his deeply personal emotions and  
8 damage from January 6th. And I am not saying in any way  
9 that Officer Goodman said anything different in January. It  
10 just means it's certainly plausible that what you say to the  
11 media may be different in kind and in substance than what  
12 you write privately to a Court for a Court to consider it.

13 And then, the second point somewhat relates to  
14 timeliness. The government, in asking -- as it should,  
15 under the Crime Victims' Rights Act, for Officer Goodman  
16 to -- whether or not he would like to participate in this  
17 sentencing by definition is asking him to relive all of  
18 this. In a way, if you are channeling those emotions into a  
19 letter for the Court and having to relive that, who is the  
20 government to ask Officer Goodman to do something on a  
21 certain timeline if the Crime Victims' Rights Act does not  
22 force him to do something on a timeline.

23 That relates to this January statement because  
24 this statement is just different in kind and in processing  
25 when that victim had to think about this stuff. So that

1 material that he provided in that letter, under 3771(a)(8),  
2 is part of his dignity and privacy; and he has that right.

3 THE COURT: All right. But Mr. Matera makes the  
4 point that I think is accurate, that Officer Goodman spends  
5 little time in his letter talking about his own personal  
6 feelings. He says himself, he is a very private person.

7 And -- but as a consequence, although he describes  
8 what he saw, what he observed, what he experienced -- there  
9 is not much in this letter about his own personal harms from  
10 what he experienced on January 6th.

11 MR. EDWARDS: Yes, Your Honor.

12 THE COURT: So what -- why should this be treated  
13 as a victim impact statement? It's unlike many that I have  
14 seen.

15 MR. EDWARDS: Yes, Your Honor.

16 At its core, that's a question of weight, not  
17 admissibility, right?

18 The officer could have come in here and recited or  
19 wrote to you the Gettysburg Address; and the Court should  
20 have to do something with that. But he didn't, right?

21 He provided what, in his personal view, was a  
22 statement that would express what he felt and what he has  
23 experienced; and that is something for the Court to  
24 consider. I understand the Court's position that some of  
25 the statements -- though, there are some that discuss

1 Officer Goodman's feelings and what he experienced; some are  
2 not.

3 And that -- I would express to the Court that the  
4 Court should take a broad view as to what "harm" is, and how  
5 an officer may experience that harm from what happened on  
6 January 6th. Everybody processes things differently, and  
7 this just happens to be this officer's way to do that.

8 If Your Honor has no other questions, I would like  
9 to address whether or not he qualifies as a crime victim.

10 THE COURT: Well, part of whether or not he  
11 qualifies as a crime victim also is related to the contents,  
12 but please proceed.

13 MR. EDWARDS: Yes, Your Honor.

14 So the Crime Victims' Rights Act defines that term  
15 very broadly. Similar to other statutes that we will get  
16 into -- I am sure -- later that deal with restitution.

17 So Officer Goodman -- I think I would just turn to  
18 the videos that the government has submitted. I mean, the  
19 argument that Officer Goodman is not a victim of what  
20 happened that day from what, in part, Mr. Rubenacker did --  
21 I don't find it meritorious. There is a mob of people that  
22 chased Officer Goodman up a flight of stairs yelling at him;  
23 Mr. Rubenacker is one of them.

24 Certainly, that falls within the broad definition  
25 of direct and proximate harm from the day of the events.



1           The cases that deal with whether or not someone is  
2           a victim under the Crime Victims' Rights Act typically deal  
3           with charges like conspiracy. Those charges -- sure -- the  
4           elements may include coming to an agreement; but there  
5           doesn't appear to be any kind of element that would involve  
6           a victim naturally because I and someone else agreed to  
7           transport a certain amount of drugs or a certain type of  
8           drugs -- that's very different. Those cases are different  
9           in kind than when someone is charged with assault and civil  
10          disorder and 1512 obstruction.

11          To the defendant's point that this officer is not  
12          one of the victims because those charges identify the  
13          government as a victim -- sure -- the government is a  
14          victim; but the conduct of Mr. Rubenacker is what is  
15          relevant, and his conduct involved obstructing that  
16          proceeding by doing something.

17          And 1512 is an extremely broad statute, in terms  
18          of how you can obstruct something as evidenced by the  
19          guidelines. The way he did it was helping to chase Officer  
20          Goodman up the flight of stairs. I don't think there is a  
21          question as to whether Officer Goodman qualifies as a victim  
22          here.

23                 THE COURT: All right. Thank you.

24                 MR. EDWARDS: Thank you.

25                 THE COURT: Mr. Matera, do you want to respond or

1       reply?

2               MR. MATERA:  No.  No, thank you, Your Honor.

3               THE COURT:  All right.  Sorry.  This -- I know  
4       it's painful that this microphone keeps flaring like this;  
5       it mostly affects my court reporter's hearing, so she's  
6       suffering through.

7               All right.  I am going to overrule the defense  
8       objection to consideration of Officer Goodman's victim  
9       impact statement.

10              As we have already clarified -- and I think as  
11      defense concedes -- a victim can appear in court on the day  
12      of sentencing with, basically, little prior notice, and has  
13      a right to make a statement.  So, in terms of timeliness of  
14      the Court's consideration of the victim impact statement,  
15      that objection holds little water under Federal Rules of  
16      Criminal Procedures 32(i)(4) and 60(a)(3).

17              With respect to the more fundamental question and  
18      objection that the defense has raised as to whether this  
19      qualifies as a victim impact statement, let me just say, as  
20      an initial matter, the Crime Victims' Rights Act defines  
21      "crime victim" very broadly to include:  A person directly  
22      and proximately harmed as a result of the condition of a  
23      federal offense, 18 U.S.C. Section 3771(e).  And as the  
24      Eleventh Circuit found in 2016, in *U.S. v Guerrier*:  Nothing  
25      evidences that police officers are categorically excluded

1 from the definition of crime victim. And injuries to police  
2 officers, like Officer Goodman, that are directly and  
3 proximately caused by a federal offense qualifies them as  
4 victims under the CVRA.

5 Here, defense contends that Officer Goodman was  
6 not harmed as a result of the events of January 6th, 2022,  
7 [sic] based on the substance of his victim impact statement,  
8 which references what he experienced that day in terms of  
9 his observations and what he did as opposed to, basically,  
10 opening up his heart and his mind as to what his feelings  
11 are. He does refer to the feelings of fear, nightmares,  
12 need for mental health treatment by his coworkers at the  
13 Capitol Building; things that continue to linger as people  
14 who work there continue to suffer from what was experienced  
15 on January 6th.

16 And although Officer Goodman doesn't share that  
17 he, too, is feeling all of these things, it is, as -- I  
18 agree with the government that -- based on what I have seen  
19 from the videos, it is not a far leap to appreciate the  
20 terror that the police officers who were overwhelmed that  
21 day -- and in particular Officer Goodman, who was chased up  
22 the stairs by an angry mob until he found his colleagues,  
23 fellow police officers on the line in the Ohio Clock  
24 Corridor at the top of the stairs -- I am sure he felt  
25 relief he found his buddies up there to help him control the

1 mob to a certain extent. I think that that qualifies him as  
2 a victim of this mob action on January 6th.

3 In any event, even if Officer Goodman did not  
4 technically meet in some way, the statutory definition of a  
5 crime victim, I do possess full discretion to consider this  
6 information under 18 U.S.C. Section 3661, and will do so;  
7 but I do think it does qualify as a crime victim impact  
8 statement, and will consider it in that way as well.

9 All right. So with that resolved, now let's turn  
10 to step one of the sentencing hearing to review any  
11 objections -- at least to the factual portions of the  
12 presentence investigation report -- before I get to the more  
13 substantive objections, Mr. Matera, that you have raised to  
14 the guideline determinations.

15 So the final presentence report and sentencing  
16 recommendation docketed at ECFs 52 and 53 were filed on  
17 April 21, 2022. And I understand from the PSR that the  
18 government has no objection to any of the factual or any of  
19 the other determinations set forth in the PSR.

20 Is that correct, Mr. Edwards?

21 MR. EDWARDS: That's correct, Your Honor.

22 THE COURT: Mr. Rubenacker, could you just stand  
23 right where you are, please. And you can pull the  
24 microphone over to you.

25 Are you fully satisfied with your attorney in this

1 case, Mr. Rubenacker?

2 THE DEFENDANT: Yes, I am.

3 THE COURT: Do you feel that you have had enough  
4 time to talk to your attorney about the presentence  
5 investigation report and the sentencing recommendation, and  
6 all of the other papers submitted in connection with your  
7 sentencing?

8 THE DEFENDANT: Yes.

9 THE COURT: All right. You may be seated.

10 And, Mr. Matera, have you and your client read and  
11 discussed the presentence investigation report?

12 MR. MATERA: We have, Your Honor.

13 THE COURT: And I understand that the defendant  
14 has objections to the guideline determination which we're  
15 going to turn to next. But as to the factual statements in  
16 the presentence investigation report, it's my understanding  
17 the defendant has no objections to that portion -- those  
18 portions of the PSR; is that correct?

19 MR. MATERA: That's correct, Your Honor.

20 THE COURT: All right. So having heard no  
21 objection raised by either side to any of the factual  
22 statements in the presentence investigation report, I do  
23 find that those portions of the PSR are undisputed; and I do  
24 accept them as my findings of fact at sentencing as  
25 supplemented by my review of the video and photographic --

1 still photographic exhibits submitted by the government.

2 All right. We're at step two of the hearing where  
3 I will discuss determination of the guidelines here.

4 I am going to just start for clarification -- so  
5 that we are all on the same page -- the defendant's  
6 convictions on four of the counts, Counts 7, 8, 9, and 10,  
7 are not subject to the U.S. sentencing guidelines, so I need  
8 only decide how the guidelines apply to the defendant's  
9 convictions on Counts 1 through 6.

10 And I appreciate that Mr. Matera has raised  
11 objections to the guideline determination for those six  
12 convictions that are subject to the guidelines; but I want  
13 to start with what I think everybody agrees on before I turn  
14 to what is disputed.

15 So starting with the criminal history -- as to the  
16 criminal history, the PSR -- presentence report -- found  
17 that Mr. Rubenacker has no prior criminal convictions; and  
18 so, under the guidelines, he has a criminal history score of  
19 zero, which puts him in Criminal History Category I. And I  
20 take it the government has no objection to that criminal  
21 history category determination.

22 Is that correct?

23 MR. EDWARDS: Yes, Your Honor.

24 THE COURT: And, Mr. Matera, no objection?

25 MR. MATERA: No objection.

1           THE COURT: I also believe that neither party has  
2 an objection to the way in which the presentence  
3 investigation report has grouped the counts, essentially,  
4 altogether, rather than in multiple separate, distinct  
5 groups. And by grouping them, basically, altogether, the  
6 probation office has avoided a multiple-count upward  
7 adjustment, which would have added offense levels to the  
8 ultimate total offense level, which would have produced a  
9 more severe sentence.

10           So I believe that all the parties agree that the  
11 grouping, as outlined in the presentence report, is correct.  
12 And, specifically, Count 1 and Count 3 are grouped together  
13 under the guideline at Section 2A2.2 -- are both subject to  
14 the guideline at 2A2.2, and are grouped together under the  
15 guideline governing grouping under 3D1.2(b) because both  
16 those charges involve the same victim; and two or more acts  
17 or transactions connected by a common criminal objective or  
18 constituting a common scheme or plan.

19           And those two counts, 1 and 3, are then grouped  
20 together with the four other counts subject to the  
21 guidelines, under the guideline at Section 3D1.2(c) because  
22 each of those four counts embodies conduct treated as  
23 specific offense characteristics in or other adjustments to  
24 the guidelines applicable to another of those counts. And  
25 so given this grouping of multiple counts, the guideline

1 with the highest offense level determines the ultimate  
2 offense level and sentencing range in this case.

3 So does the government have any objection to the  
4 manner in which -- that I have just reviewed the probation  
5 office has grouped the counts?

6 MR. EDWARDS: No, Your Honor; although, just one  
7 note that part of the grouping is -- branches from the  
8 2J1.2(b) (1) (B) enhancement under 1512. So because of that  
9 specific offense characteristic embedded in other counts, it  
10 would -- they group under 3D1.2(c).

11 If that's -- it sounds like that's what we're  
12 going to get to next; I don't want to get ahead of myself.  
13 So that may change depending on the Court's ruling, and how  
14 the guidelines play out.

15 THE COURT: Right. I understand that, but --

16 MR. EDWARDS: Overall, though, no objection, Your  
17 Honor.

18 THE COURT: Right.

19 And, Mr. Matera?

20 MR. MATERA: No objection.

21 THE COURT: Right.

22 But I think what you are saying also,  
23 Mr. Edwards -- just to follow through that thought -- is  
24 that if I accept one of Mr. Matera's objections to  
25 application of that specific offense characteristic, the



1 grouping may change?

2 Is that the import of what you are saying?

3 MR. EDWARDS: That's correct, Your Honor.

4 Yes, Your Honor.

5 THE COURT: And as a result of the grouping  
6 analysis changing, there might actually be required units to  
7 be added that would increase the severity of the offense  
8 level. Is that the import of what you are saying?

9 MR. EDWARDS: Yes, Your Honor.

10 THE COURT: Got it.

11 MR. EDWARDS: Thank you.

12 THE COURT: All right. But accepting the grouping  
13 that the probation office has set out, in the presentence  
14 report, the guideline with the highest offense level  
15 determines the ultimate offense level. So now let's turn to  
16 the parties' disputes about what the highest -- what the  
17 guideline with the highest offense level is.

18 So, the defendant argues that he believes the  
19 guideline at 2A2.2, which is applicable to Count 3, for  
20 assaulting, resisting, or impeding certain officers under  
21 18 U.S.C. Section 111(a)(1), should determine his sentencing  
22 range as the highest guideline.

23 The government and probation office believe that  
24 the guideline at Section 2J1.2, applicable to his Count 2  
25 conviction for obstructing an official proceeding under

1 18 U.S.C. Section 1512(c)(2) has the highest guideline, and  
2 should govern the defendant's sentencing range here.

3 So the parties agree that the guideline at 2J1.2  
4 applies to his offense conduct on Count 2. And what they  
5 disagree about is whether two specific offense  
6 characteristics, which I am going to call -- using  
7 shorthand, in sentencing lingo -- SOC's, for specific offense  
8 characteristics provided -- are set out in 2J1.2. And the  
9 defense believes they are inapplicable to the defendant's  
10 case; and the government and the probation office believe  
11 that they are applicable.

12 Let me just say that offense conduct that violates  
13 a criminal statute, it falls under a guideline vary -- can  
14 vary in many different ways. SOC's, specific offense  
15 characteristics, are designed, under the guidelines, to  
16 capture some of the different aspects of criminal conduct  
17 that may warrant a more or less severe sentence. So put  
18 another way, SOC's are aggravating or mitigating factors  
19 relating to particular types of offense conduct.

20 So if the guideline at 2J1.2 applies with the two  
21 disputed SOC's, that guideline will produce the highest total  
22 offense level and control the sentencing range, rather than  
23 the guideline at 2A2.2 for Count 3, as the defendant  
24 proposes. So I am going to start this analysis with the  
25 defendant's objections to the two SOC's in the guideline at

1 2J1.2.

2 Mr. Matera, I will hear you if you want to  
3 supplement your arguments, which have been fairly laid out  
4 in some detail in your briefing; but I will hear you about  
5 this, if you want to supplement them anyway.

6 MR. MATERA: Thank you, Your Honor.

7 Obviously, Your Honor, as you indicated, I am sure  
8 has thoroughly read everything that we've submitted. I  
9 think we have gone over it in our papers rather extensively.

10 THE COURT: Right. And so let me just --

11 MR. MATERA: Sure.

12 THE COURT: -- cut to the chase, I mean -- just so  
13 I -- let me just tell you what I understand your objections  
14 to be; you can supplement that if I'm missing something.

15 You did add in your supplemental brief, I think,  
16 an additional objection. So let me just make sure I  
17 understand your argument.

18 You object to using the SOC in the guideline  
19 2J1.2(b)(1)(B), which applies an eight-offense level  
20 increase, quote: If the offense involved causing or  
21 threatening to cause physical injury to a person or property  
22 damage in order to obstruct the administration of justice.  
23 And you raised two objections to that.

24 First, you believe that the defendant did not  
25 cause or threaten to cause physical injury to any person,

1       which is a prerequisite for application of that (b) (1) (B)  
2       SOC. And, second, your objection is that the event at issue  
3       does not involve the administration of justice.

4               So those are your two objections to the  
5       eight-offense level SOC.

6               You also object to applying the SOC at  
7       2J1.2(b) (2) -- the (b) (2) SOC -- which applies a  
8       three-offense level increase if the offense resulted in  
9       substantial interference with the administration of justice.  
10      The administration of justice, of course, being the same  
11      phrase used in the (b) (1) (b) SOC. And your objection that  
12      what -- the congressional certification taking place on  
13      January 6th did not involve the administration of justice.

14              I also understand, in your supplemental briefing,  
15      that you argue that this defendant's conduct standing alone  
16      did not result in the unnecessary expenditure of substantial  
17      governmental resources, which is the definition provided in  
18      the guidelines for application of that three-offense level  
19      2J1.2(b) (2) SOC.

20              MR. MATERA: That's correct, Your Honor.

21              THE COURT: Is that -- am I missing any of your  
22      objections? Is that the universe of your objections, those  
23      two SOC's?

24              MR. MATERA: Right. I think you have covered it.

25              THE COURT: Okay. Got it. Well, that's very

1       important. I don't want to miss something.

2               MR. MATERA: Yes.

3               THE COURT: Okay. So if you don't add anything to  
4       your briefing -- because I have read everything.

5               Let me just ask you a couple of questions.

6               MR. MATERA: Sure.

7               THE COURT: So your concern about whether both  
8       these SOCs apply, because both of them have a  
9       prerequisite -- uses this phrase that there has to be some  
10      interference or obstruction of the administration of  
11      justice.

12              MR. MATERA: Correct.

13              THE COURT: And your concern is that the  
14      administration of justice only applies to judicial or grand  
15      jury proceedings; is that right?

16              MR. MATERA: Or quasi-judicial --

17              THE COURT: Or quasi-judicial proceedings.

18              MR. MATERA: Correct.

19              THE COURT: And by quasi-judicial proceedings, you  
20      mean: Executive branch agency adjudicatory proceedings. Is  
21      that right?

22              MR. MATERA: Sure. Yes. Yes.

23              THE COURT: All right. So the fact is, though,  
24      that his conviction on Count 2 for violating 18 U.S.C.  
25      Section 1512(c)(2), is for obstructing an official

1 proceeding which is defined in 1515(a)(1)(B) as "a  
2 proceeding before Congress"; and that -- so that statute  
3 which he is convicted on in Count 2 is -- involves  
4 obstruction of congressional proceedings, and is  
5 specifically referenced under the guidelines by the  
6 sentencing commission, 2J2.1, which is titled obstruction of  
7 justice and -- well, 2J2.2 actually, "Obstruction of  
8 Justice."

9 And so are you saying that the commission made a  
10 mistake by referring 1512(c)(2) in its entirety to this  
11 particular guideline because -- why would the commission  
12 refer a statute to a guideline that didn't cover it in two  
13 of its SOCs?

14 MR. MATERA: Judge, I think what I am saying is  
15 that there is a difference between what was intended and  
16 what the electoral certification process was, which -- the  
17 electoral certification process -- and, again, I understand  
18 you have read my brief, but -- simply put, does not  
19 constitute an event dealing with the administration of  
20 justice.

21 Now, the government has suggested in their papers  
22 that -- well, they're obligated to have this proceeding;  
23 they're obligated to certify the election so, therefore,  
24 because they're obligated, it would qualify. We  
25 respectfully disagree.

1           The bottom line is that there is no part -- the  
2       truth is that the electoral certification process, for the  
3       majority of times, is a mostly ceremonial process where they  
4       are -- obviously, this particular one was -- went to  
5       different lengths and objections were filed; and I  
6       understood that they have been filed in the past. But they  
7       are still not -- it still does not involve the  
8       administration of justice because, as Judge Moss stated in  
9       the *Montgomery* decision, that's not what Congress does.  
10      What Congress does is different and apart. Now, as he  
11      indicated, there is a matter of separation of powers; that  
12      is not what Congress does to effect the administration of  
13      justice.

14           This morning I walked by the Supreme Court  
15      building. And I am sure Your Honor --

16           THE COURT: You do refer to *Montgomery*. But in  
17      talking about the administration of justice and the  
18      separation of powers in *Montgomery*, Judge Moss was not  
19      dealing with application of the SOC's in the guideline 2J1.2,  
20      was he?

21           MR. MATERA: Agreed. He was not. He was not. He  
22      was discussing it in a different context; but I think --

23           THE COURT: Totally different context.

24           MR. MATERA: Yes, it was. But I think his words  
25      are still very clear where he says specifically: Congress

1 does not engage in the administration of justice.

2 There is -- it's the defendant's position that  
3 there is no view of the certification of an election that  
4 has to do with the administration of justice.

5 "Justice" being -- and I don't want to rehash all  
6 of my arguments, Your Honor obviously has read them. But  
7 justice has to do with ensuring equal protection; ensuring  
8 all kinds of rights of that individual's -- that we, as  
9 citizens, have. That's not what the certification of an  
10 election is.

11 Certification of an election is to count votes  
12 that were rendered during the November election and to  
13 determine or confirm who the President of the United States  
14 is going to be; that has nothing to do with the  
15 administration of justice.

16 THE COURT: And that's based on your  
17 interpretation of the meaning of that phrase.

18 All right. I think I understand -- I understand  
19 your argument. Okay. I get it.

20 So the -- in your view, the sentencing commission,  
21 if it wants to refer obstruction of congressional  
22 proceedings to 2J1.2 and have all of the applicable SOCs  
23 apply, they need to fix the language of those SOCs.

24 MR. MATERA: Sure. Yeah. If that was what was  
25 intended, it could have very easily said so; it doesn't. I



1 think it's too far of a leap to take what's written under  
2 the SOCs and apply it to an electoral certification process.

3 Sorry. I am tongue-tied.

4 THE COURT: All right. Thank you.

5 MR. MATERA: Thank you, Judge.

6 THE COURT: Does the government want to respond?

7 MR. EDWARDS: Yes, Your Honor. Just briefly, to  
8 supplement all of the filings.

9 So, first, I understand the defendant is arguing  
10 that the guidelines provisions do not -- the phrase  
11 "administration of justice" only includes judicial grand  
12 jury or quasi-judicial proceedings. The problem with his  
13 position is the guidelines' text does not support that  
14 position. The chapter of 2J is actually titled -- I don't  
15 want to get this wrong -- Offenses Involving the  
16 Administration of Justice. Right?

17 That phrase is used broadly in the guidelines.  
18 It's not just used in the specific offense characteristic;  
19 it's used in the chapter title. And when it defines what  
20 offenses are included under Part J titled, "Offenses  
21 Involving the Administration of Justice," the statutory  
22 provisions include, most importantly, 18 U.S.C. 1512. But  
23 they also include -- nearly half of the statutes, total,  
24 include obstruction of proceedings that are not judicial,  
25 quasi-judicial, or grand jury in nature.

1           So under the defendant's reading, if the Court  
2       were to adopt that narrow definition of "administration of  
3       justice," nearly half the statutes would no longer have any  
4       of the specific -- the most weighty specific offense  
5       characteristics applied to them; that gap is awkward at  
6       best, and wrong at worst.

7           There are -- the purpose of these specific offense  
8       characteristics, as the Court alluded to, is to allow the  
9       court to have the flexibility to address a broad swath of  
10      conduct and apply sentencing guidelines that allow for  
11      predictable, fair applications of sentencing guidelines to  
12      defendants across the country. So those guidelines are  
13      meant to have this gradient effect where the Court can pick  
14      and pull from tools depending on how a defendant conducts  
15      himself to commit a crime. That is included here.

16          And if you were to adopt the defendant's  
17      arguments, there are a host of proceedings that could be  
18      obstructed at Congress violently but have no specific  
19      offense characteristic that would apply; they would get 14  
20      points. That is not what the sentencing commission intended  
21      here, and the text makes that clear.

22          The case law also makes it clear -- respectfully,  
23      I disagree with the defendant's position in his reply paper  
24      that the cases the government cited are wrong.

25          There are a number of cases we cited, such as

1     *Atlantic States Cast Iron Pipe Company*, from SDNY -- there  
2     is no judicial proceeding tied to that. There is no grand  
3     jury proceeding tied to it and there is no quasi-judicial  
4     proceeding, yet the court found that the plus 3 was  
5     applicable.

6             *United States versus Ali*, in the Seventh Circuit,  
7     Judge Posner wrote a relatively short opinion; and he  
8     applied the text. The text says: Substantial  
9     interference -- I will quote it, I should have it memorized  
10    at this point. It says, "The unnecessary expenditure of  
11    substantial governmental or court resources."

12            So what Judge Posner did was assess what are the  
13    governmental resources that were unnecessarily expended in  
14    this case. There was a court order involved in the factual  
15    basis of the case because there was a court order from a  
16    state that said that the spouse -- this was an international  
17    kidnapping case -- that the spouse had paternal rights.  
18    That's not why Judge Posner applied the plus 3. He applied  
19    it because the government had to expend unnecessary  
20    resources to go get the children back from another country.

21            THE COURT: But isn't the defense right, in some  
22    ways that -- in each of those cases that did involve, you  
23    know -- that the government has cited, don't they involve  
24    some tether to a court proceeding?

25            In the child kidnapping case --

1 MR. EDWARDS: No, Your Honor.

2 THE COURT: It was -- what? -- a violation of a  
3 court order, and so that's why there was this expenditure of  
4 expenses for governmental officials to go out and get the  
5 kid back --

6 MR. EDWARDS: Sure.

7 THE COURT: -- to enforce the court's order.

8 MR. EDWARDS: Your Honor, there will always be a  
9 judicial proceeding tied to these arguments because there  
10 will always be a criminal case that brings us to this  
11 platform. Right?

12 But the controlling question here is, first of  
13 all, what did the defendant do to cause an unnecessary  
14 expenditure of governmental resources?

15 And then, two, what does the case law say about  
16 how they apply these enhancements?

17 And they just don't reference the court order or  
18 the judicial proceeding. They reference *Atlantic States*  
19 *Cast Iron Pipe* [sic], SDNY reference.

20 First of all, there was no court proceeding; it  
21 was an entirely congressional investigation.

22 THE COURT: Let me ask you sort of a slightly  
23 separate question.

24 I know the government has indicated that both of  
25 these disputed SOC's in 2J1.2 have been applied in other

1 cases arising from the events on January 6th; so I am not  
2 the first judge asked to apply these SOC's.

3 The defendant makes a good point, though, that, in  
4 all of those other cases, they were subject to a plea  
5 agreement where the defendant waived any right to challenge  
6 application of those SOC's. So is this the first time -- I  
7 haven't done a survey of my colleagues. But is this the  
8 first time that a judge on this court, in the context of  
9 January 6th, has had to resolve a dispute over application  
10 of these two SOC's and the meaning of administration of  
11 justice and whether it applies to the events on January 6th?

12 MR. EDWARDS: No. So the defendant is right, a  
13 number of cases have resolved by plea agreement.

14 Of course, the Court, as you are well aware,  
15 always is the final arbiter as to whether a guideline  
16 actually applies, and the courts, in all of those cases, did  
17 apply them.

18 But to Your Honor's question, Judge Moss, in  
19 *United States versus Miller*, this week, on Monday -- Case  
20 Number 21-CR-75 -- addressed this issue in a slightly  
21 different format than we sit today; but it was still  
22 contested. So here is how.

23 The parties agreed, in their plea agreement, that  
24 the plus 3 applied, 2J1.2(b)(2); probation disagreed. And  
25 it forced a position where the defense counsel then took a

1 position that -- if I understand it, that they had agreed in  
2 the plea agreement, but that they would not object to the  
3 final PSR, understandably.

4 So it forced Judge Moss to be in a position of  
5 resolving when the objections came out -- or when the  
6 government objected, how 2J1.1(b)(2) applies. Judge Moss --  
7 unfortunately, the government ordered the transcript during  
8 the proceeding, but it didn't come. Judge Moss ruled on  
9 this and said, look -- in fact, he relied on -- he  
10 explicitly stated that his opinion in *United States versus*  
11 *Montgomery* is not in contradiction with applying 2J1.1(b)(2)  
12 in the January 6th context.

13 He explicitly said that his opinion in  
14 *United States versus Montgomery* dealt with, as this Court is  
15 aware, whether 1512(c)(2) applied to the official  
16 proceeding, whether January 6th was an official proceeding.  
17 That is a different question entirely than: Does the  
18 administration of justice in the guidelines -- how does that  
19 term work -- right? -- given the context of the guidelines  
20 and given the language?

21 The Court can rely on the case we cited in  
22 *DePierre* when the Supreme Court explicitly has held: A  
23 statute -- a criminal statute and sentencing guidelines can  
24 use the same term but use them differently, and that's okay.  
25 They do that with regard to how cocaine or crack cocaine

1       should be defined.

2               THE COURT:   Can I cut to the chase?

3               MR. EDWARDS:   Yes.

4               THE COURT:   Did he apply the 3-offense level?

5               MR. EDWARDS:   I should have started with the  
6       bottom-line in front.

7               Yes.   The judge found that 2J1.1(b)(2) applied in  
8       this context in part because the administration of justice  
9       is a broad term used in the guidelines.

10              In fact, Your Honor, I wish I had thought of it.  
11       I did not realize the chapter titled Part J was "Offenses  
12       Involving the Administration of Justice"; Judge Moss did.  
13       So, for those reasons, the Court doesn't have to be the  
14       first court to do this.   Judge Moss has already ruled on  
15       that in ways that are very similar to what the government  
16       has written in its brief.

17              I just want to address one or two other points the  
18       defense brought out.   He explicitly stated that "justice" --  
19       meaning, under any dictionary -- it does not capture what  
20       was happening on January 6th.   The problem with that is  
21       Judge Moss also turns to the dictionary, and the government  
22       turned to the dictionary and found that there are plenty of  
23       definitions of these broad phrases of "administration" and  
24       of "justice," and have found plenty definitions that  
25       include:   The carrying out of laws.

1           3 U.S.C. 15, the Twelfth Amendment, Congress --  
2     the Joint Session that was going on that day was certainly  
3     carrying well-delineated statutes and constitutional  
4     amendments that have occurred every four years throughout  
5     the history of this country. So if that's not the  
6     administration of justice, I don't know what is; and the  
7     sentencing commission certainly didn't either then.

8           THE COURT: All right. One thing that you haven't  
9     had, I don't think, is an opportunity to submit a second  
10    supplemental memo on -- was the objection raised in the  
11    defense's supplemental memo for the first time, which is  
12    that the -- relying on *U.S. v Tackett*, the Sixth Circuit  
13    1999 case, which is cited for the proposition of the  
14    3-offense level. Substantial interference with  
15    administration of justice SOC doesn't apply because the  
16    government not only must identify a particular expenditure  
17    of governmental resources, but must show but-for causation  
18    between the defendant's conduct -- those governmental  
19    resources would not have been expended; in addition to the  
20    final element that *Tackett* lays out -- that those  
21    governmental resources were expended in a substantial  
22    amount.

23           So how does the government review the but-for  
24    requirement playing out here if you agree that it applies  
25    here or not?



1           So do you want to respond to that objection to the  
2           SOC which, as I said, you haven't had an opportunity to  
3           respond to yet.

4           MR. EDWARDS: Yes, Your Honor.

5           So in one of the cases the government cites,  
6           *United States versus Weissmann*, there is a footnote that  
7           explains a little bit of context about what that but-for  
8           prong of this test means. It is tied -- according to that  
9           court -- to the element in the definition in Commentary  
10          Note 1 saying: The unnecessary expenditure. The court  
11          stated that this but-for prong was really trying to capture  
12          was the expenditure unnecessary.

13          There are certain cases where the government  
14          already has information; the defendant commits perjury;  
15          there is a question of whether or not the expenditure of  
16          resources from the government was unnecessary if we already  
17          had the information. Certainly, not what is going on here.

18          What is happening is the defendant is positing to  
19          you, respectfully, a false comparison. What he's saying is  
20          the Court should compare two fact patterns; one, a mob that  
21          overruns the United States Capitol Building on January 6 and  
22          causes the \$2.7 million of damages, and growing, without  
23          Greg Rubenacker versus a mob that does that with Greg  
24          Rubenacker; and says: Well, it would have happened. The  
25          government would have had to expend all of these resources.

1       That's not the comparison.

2               The comparison is: If Greg Rubenacker and these  
3 people do this on January 6th, like they did, versus if they  
4 don't -- the comparison here is the government -- there is  
5 no question that what happened on January 6 was unnecessary.  
6 There is no question that the \$2.7 million that the entities  
7 have given the United States government as far as damages  
8 was unnecessary; Greg Rubenacker played a role in that.  
9 Smaller than some, bigger than some; and we can get to that  
10 when we get to restitution.

11              But as it relates to this enhancement -- which all  
12 it does is require the government to show by a preponderance  
13 of the evidence that there is an unnecessary expenditure of  
14 money, of governmental resources, January 6th is it. There  
15 is no question that comparing what has happened throughout  
16 the history of the United States to January 6th, 2021 --  
17 that was unnecessary; it had never been done, and it didn't  
18 have to be done. So the government now has found itself in  
19 a position of picking up the pieces after Greg Rubenacker  
20 and others did what they did. So that specific offense  
21 characteristic applies.

22              I did not get an opportunity to address either of  
23 his factual arguments; I am happy to address those. It's  
24 very related to what the government has just stated.

25              THE COURT: Yes. Go ahead.

1           MR. EDWARDS: But in terms of -- at the very  
2           least, his argument that what Greg Rubenacker did that day  
3           was not -- did not meet the factual predicate of (b)(1)(B),  
4           the plus 8; specifically, whether or not what he did would  
5           reasonably foreseeably lead to physical harm to someone or  
6           property damage -- respectfully, Your Honor, the government  
7           disagrees.

8           This is a defendant who chased an officer up  
9           multiple flights of stairs to the Ohio Clock room while he  
10          is backing up and telling them to go away. That is an  
11          officer that could have easily been injured given that  
12          Defendant's conduct. It is beyond reasonably foreseeable  
13          that what he was doing that day may lead to injury.

14          He smoked marijuana in the Rotunda. He threw  
15          liquid in the Rotunda. He breached the Capitol twice.  
16          He -- I apologize -- at some point throws himself -- with a  
17          line of other rioters, as the videos have shown, Your Honor,  
18          against a line of officers, forcing officers to deploy  
19          chemical irritant spray; that could hurt other rioters, that  
20          could hurt other officers that don't have masks on, that  
21          could damage the paintings in the building.

22          Everything the defendant did that day -- about --  
23          reasonably foreseeably led and did lead to property damage  
24          and physical harm to some people, especially when you  
25          consider the charges he's pled guilty to.

1           So, Your Honor, for the reasons stated in the  
2           supplemental memo, particularly in the government's  
3           sentencing memo -- both of these enhancements apply legally  
4           and may apply factually.

5           THE COURT: All right. Thank you, Mr. Edwards.  
6           Mr. Matera, any response?

7           MR. MATERA: Just very quickly, please, Your  
8           Honor. I just wanted to address -- if I understood  
9           Mr. Edwards correctly, I guess the decision -- did you say  
10          Member -- Member --

11          MR. EDWARDS: *Miller*.

12          MR. MATERA: *Miller*, I'm sorry. I couldn't hear  
13          that.

14          So the decision in the *Miller* case, I am  
15          gathering, just came out this week. Certainly, I am not in  
16          a position to discuss that; I don't know the facts of the  
17          *Miller* case. But I also --

18          THE COURT: Neither do I.

19          MR. MATERA: If I understood correctly, the  
20          indication was that only the 3 points were applied and not  
21          the 8 points, so, obviously, there is some difference  
22          between the two cases. Again, I am not privy to it, so I  
23          can't say. I understand Your Honor cannot either at this  
24          point in time.

25          But I also would point out that it would not be

1 the first time, in connection with January 6th cases, that  
2 different judges in this courthouse can potentially  
3 disagree. We, obviously, have some different decisions that  
4 are out there right now as to the viability of the  
5 obstruction charge in the first place. So again --

6 THE COURT: I think there are unanimous findings  
7 on most points having to do with 1512(c)(2) --

8 MR. MATERA: Understood.

9 THE COURT: And then there is -- one of my  
10 colleagues who is discrete on ultimate conclusion.

11 MR. MATERA: Right. Which, obviously, at some  
12 point, is going to have to be resolved; whether it's at this  
13 level or the next level --

14 THE COURT: I think there is a motion for  
15 reconsideration pending before that colleague.

16 MR. EDWARDS: I was aware of that. I don't know  
17 that it's been resolved yet from the last I heard; but I was  
18 informed that there was a motion for reconsideration.

19 So, again, I just wanted to point out to the  
20 Court -- without having this *Miller* decision or the facts, I  
21 am not in a position right now to make any more comments  
22 than I just have to Your Honor. We don't know. So to  
23 consider specifically what went on there, we are kind of --  
24 would require us to do it in a vacuum right now.

25 THE COURT: I am not going to rely on the *Miller*

1 decision repeated only orally here. I was curious.

2 MR. MATERA: Got you. I understand.

3 You had asked the question during the plea hearing  
4 as well; at that time there wasn't. Apparently, now there  
5 is. I would be curious to see what that one says as well.  
6 Thank you.

7 THE COURT: Thank you, Mr. Matera.

8 MR. EDWARDS: If I can just clarify one factor.

9 THE COURT: Yes.

10 MR. EDWARDS: I may have misstated -- I don't  
11 believe I did.

12 The posture of the *United States versus Miller* was  
13 that probation had applied the plus 8, not the plus 3. So  
14 there was no disagreement as to the plus 8.

15 Judge Moss ultimately ruled that both would be in  
16 play and, in fact, explicitly said because of his ruling on  
17 what "administration of justice" means, he felt like  
18 (b) (1) (B) was the same term and should be interpreted the  
19 same. Thank you.

20 THE COURT: All right. Thank you.

21 It's good to know. Sometimes, we rely on hearings  
22 and defense counsel and the government to let us know what  
23 is going on in courtrooms at different floors of the  
24 courthouse since we're all very busy and are not keeping  
25 track of what, precisely, all of our colleagues are doing on

1       these cases.

2               All right. So I am going to rule on the  
3       objections to the SOC's raised by the defense in terms of  
4       application of those SOC's in 2J1.2 to the facts of this  
5       case. These objections are overruled.

6               I will begin the discussion with the 8-offense  
7       level increase by application of the SOC provided in the  
8       guideline 2J1.2(b) (1) (B). The defendant objects to this --  
9       application of this SOC for two reasons; stating, one: At  
10      no time did Defendant cause or threaten physical injury to  
11      any person; and, two, just as an important, the event at  
12      issue does not involve the administration of justice as it  
13      was not related to a judicial or grand jury proceeding.  
14      Those are quotes from the defendant's memo -- original memo,  
15      at pages 9 through 10.

16              I am going to address these reasons seriatim.

17              First, the defendant argues that the SOC, at  
18      2J1.2(b) (1) (B), is inapplicable because he did not at any  
19      time cause or threaten physical injury to any person, which  
20      is a requirement or trigger for application of that SOC.

21              In support of his position, the defendant cites  
22      dictionary definitions of the term "threat," including from  
23      the *Oxford English Dictionary*, which says this means to:  
24      Declare, usually conditionally, one's intention of  
25      inflicting injury upon a person; *Webster's Third New*

1     *International Dictionary* definition, which describes a  
2     "threat" as: Expression of an intention to inflict loss or  
3     harm on another by illegal means and especially by means  
4     involving coercion or duress of the person threatened; and  
5     the *American Heritage* dictionary definition that a "threat"  
6     means: An expression of an intention to inflict pain,  
7     injury, evil, or punishment.

8             One of these definitions requires an actual verbal  
9     communication of the threatening intent. Expression of a  
10    threat can be physical, not verbal threats of harm.

11            Here, the defendant argues he did not make --  
12    "make any threats to cause physical injury," though he  
13    certainly did taunt and verbally harass police officers.

14            His assertion that, "there is no proof whatsoever  
15    that he ever threatened to cause physical injury to anyone"  
16    is contrary to the actual evidence in this case and appears  
17    based on an overly limited understanding of threatening  
18    conduct to require a verbal threat.

19            The defendant's physical movements inside the  
20    Capitol communicated threats to law enforcement. This was  
21    not one of the rioters who, on January 6th, merely walked  
22    inside the Capitol for a few minutes or seconds and then  
23    left with no encounter or engagement with any law  
24    enforcement officers. The obstructive conduct to which this  
25    defendant pled guilty included joining the mob and chasing



1 Officer Goodman up the stairs outside the Senate Chamber,  
2 and then pointing and yelling at officers upstairs in the  
3 Ohio Clock Corridor at a time when Officer Goodman and the  
4 other officers were totally outnumbered.

5 This defendant was one in that crowd who disobeyed  
6 Officer Goodman and the other police officers in the Ohio  
7 Clock Corridor when they refused to disperse and leave the  
8 building immediately.

9 His pursuit of Officer Goodman up the stairs into  
10 the Ohio Clock Corridor, in blatant disregard for this  
11 officer's instructions to stand back and leave, as the crowd  
12 of angry, yelling rioters swelled around him, constituted a  
13 clear and direct threat to the safety of Officer Goodman and  
14 could have led to Officer Goodman's physical injury.

15 Officer Goodman describes this moment in what he  
16 says, in his statement, was such a long day which, for him,  
17 started at 5 a.m. that day, on January 6th. He had already  
18 seen pandemonium that looked like something from medieval  
19 times, fighting hand-to-hand combat at the west front of the  
20 Capitol.

21 And as Officer Goodman describes his confrontation  
22 with the rioters who had breached the building at the bottom  
23 of the stairs outside the Senate Chamber, he says: The  
24 rioters were yelling at me, screaming obscenities at me.  
25 The rioters were saying they were for us; they just wanted

1 to take back our country. Others were being antagonistic,  
2 asking what we were going to do, shoot them? One person  
3 said: There is one of him, and a hundred of us.

4 Officer Goodman says: I had no idea what to  
5 believe -- what to believe what their intentions were; and I  
6 retreated to the top of the stairs where there was another  
7 line of officers at the top of the stairs.

8 The defendant's yelling and taunting at the  
9 officers, in the Ohio Clock Corridor, in an agitated manner  
10 with his finger outstretched was threatening conduct,  
11 regardless of what he precisely said and whether those words  
12 contained threats of physical injury to those officers.

13 This is especially true given the surrounding  
14 circumstances. These were officers, as I said, confronted  
15 with a mob of angry people shouting, shaking their fingers  
16 and fists at them, and refusing to comply with instructions  
17 to vacate the area; this was threatening conduct. And that  
18 is just what happened during Defendant's first illegal entry  
19 inside the Capitol.

20 On his second illegal entry inside the Capitol, he  
21 joined in the face-off confrontation with officers in the  
22 Rotunda. In direct defiance of the officers' attempts to  
23 clear the area, he swung a plastic bottle at an officer's  
24 head; sprayed liquid from his bottle across multiple  
25 officers who are seen on the video footage to flinch in

1 response. And given the amount of tear gas and other  
2 chemical sprays being deployed, both by rioters and by the  
3 police, you can imagine why the police officers were  
4 flinching. This was also threatening conduct.

5 Angry members of the mob including the defendant  
6 escalated the situation in the Rotunda. They refused to  
7 follow the orders of the police, overwhelmed law  
8 enforcement, and engaged in pushing and threatening -- the  
9 bottom line is: This is threatening conduct.

10 The defendant suggests that his conduct involving  
11 the water bottle in the Rotunda is not relevant to Count 2  
12 because the acts constituting obstruction of an official  
13 proceeding in Count 2 happened at a different time. As I  
14 mentioned during my colloquy with Mr. Matera, this effort to  
15 slice and dice his actions inside the Capitol on January 6,  
16 2021, into separate little events misunderstands the overall  
17 nature of Defendant's offense conduct, all of which  
18 constitutes obstruction of the congressional proceeding  
19 covered in Count 2.

20 The fact that 24 minutes separated Defendant's  
21 first and second illegal entries into the Capitol Building  
22 is inconsequential, especially given that the defendant  
23 clearly stayed in close proximity to the Capitol Building  
24 between initially leaving and going back in. His actions  
25 during both illegal entries inside the Capitol could likely

1 have led to physical injury to Officer Goodman, the officers  
2 in the Ohio Clock Corridor, the officers the defendant  
3 assaulted with his water bottle, and as part of the mob  
4 pushing against police lines in the Rotunda -- all of his  
5 actions that day contributed to the delay of the  
6 congressional certification proceeding.

7 And all of his conduct is relevant conduct under  
8 the guideline at 1B1.1 [sic], and the Court agrees with the  
9 government and probation office that the defendant's  
10 threatening conduct toward and assaults on multiple law  
11 enforcement officers protecting the Capitol and members of  
12 Congress during the certification of the 2020 Electoral  
13 College vote renders this provision applicable. And the  
14 fact that he was not heard to utter explicit verbal threats  
15 of physical violence towards law enforcement does not bar  
16 application of the 8-level SOC in his case.

17 So, therefore, his objection to the SOC at  
18 2J1.2(b) (1) (B) -- because he did not verbally threaten  
19 serious injury to a person or property while engaging in his  
20 obstructive conduct -- is overruled.

21 Second, he argues that the 8-offense level SOC  
22 under the guideline at Section 2J1.2(b) (1) (B) does not apply  
23 to him because -- and I quote, "The event in issue does not  
24 involve the administration of justice as it was not related  
25 to a judicial or grand jury proceeding." That's what he

1       stated in his memorandum at pages 9 through 10. But he also  
2       subsequently expanded "administration of justice" to cover  
3       both judicial and grand jury proceedings, as well as  
4       quasi-judicial proceedings.

5               This objection overlaps with his objection to  
6       application of the 3-offense level SOC at 2J1.2(b)(2); so I  
7       am going to discuss those two SOC's in tandem, when it comes  
8       to this objection of whether administration of justice  
9       covers what occurred on January 6th.

10              Each SOC focuses on a distinct harm. The  
11       8-offense level SOC, at 2J1.2(b)(1)(B), requires: Causing  
12       physical injury or the threat thereof in order to obstruct  
13       the administration of justice; while the 3-offense level  
14       SOC, at the guideline Section 2J1.2(b)(2), requires:  
15       Substantial interference with the administration of justice  
16       in a manner that draws unsubstantial governmental resources.  
17       Both SOC's require the offense conduct in some way hinder the  
18       administration of justice, a critical phase, as I've said,  
19       the defendant argues is inapplicable because the business of  
20       Congress, on January 6, 2021, to certify the Electoral  
21       College results did not involve the administration of  
22       justice because it was not related to judicial grand jury or  
23       quasi-judicial -- quasi-administrative proceedings.

24              I appreciate that the phrase used in the SOC's "the  
25       administration of justice" most often calls to mind court

1 proceedings where the application of law is regularly, if  
2 not always, at stake.

3 The defendant is incorrect that the phrase "the  
4 administration of justice" is limited to the activities of  
5 courts or grand juries, or even federal agency adjudicatory  
6 proceedings.

7 The defendant cites several cases in support of  
8 his argument that the phrase "administration of justice"  
9 applies only to judicial or grand jury proceedings but those  
10 cases do not prove his point. In particular, he relies on  
11 the Supreme Court case of *U.S. v Aguilar*, 515 U.S. 593, from  
12 1995, which addressed the definition of due administration  
13 of justice used in 18 U.S.C. Section 1503. This is somewhat  
14 ironic since *Aguilar* emphasized the breadth of processes  
15 that fall under the umbrella of the phrase of "the  
16 administration of justice," which is an omnibus clause in  
17 18 U.S.C. Section 1503, which -- a statute that prohibits  
18 persons from endeavoring to influence, obstruct or impede  
19 the due administration of justice. And the challenge the  
20 Supreme Court had in *Aguilar* was to take what they viewed as  
21 a very broad phrase and to focus it more narrowly because,  
22 as the Supreme Court explained, this catchall clause was far  
23 more general in scope than the earlier clauses of the  
24 statute, which focused on tampering with petit, grand  
25 jurors, court officers, and magistrate judges.

1           In his concurrence in that case, Justice Scalia  
2 explicitly rejected the idea that since all the rest of  
3 Section 1503 refers only to actions directed at jurors and  
4 court officers, the omnibus clause -- the catchall clause --  
5 using the phrase "administration of justice" refers only to  
6 actions directed at jurors and court officers. The omnibus  
7 clause could not apply to actions directed at witnesses or  
8 other agents not previously named in the statute.

9           Instead, Justice Scalia explained that the omnibus  
10 clause was one of the several distinct and independent  
11 prohibitions contained in 1503, and explained his  
12 understanding that: The due administration of justice to  
13 apply only to judicial and grand jury proceedings would  
14 render it superfluous. Thus, both the majority opinion and  
15 the concurrence by Justice Scalia, clearly understood the  
16 due administration of justice to be a much broader category  
17 that included but was not limited to judicial proceedings  
18 referenced in this statute at Section 1503.

19           In any event, as the Supreme Court has noted,  
20 terms may and regularly do carry different definitions when  
21 appearing in a statute versus a guideline. See *DePierre v*  
22 *United States*, 564 U.S. 70, jump cite 88, from 2011,  
23 rejecting the argument that "cocaine base," as used in one  
24 statute, must be given the same definition as it has under  
25 the guidelines.

1           Relatedly, Mr. Matera, on behalf of the defendant,  
2           cites to language in Judge Moss's decision in *U.S. v*  
3           *Montgomery*, stating that: Congress does not engage in  
4           adjudicative proceedings or even quasi-adjudicative  
5           proceedings or in the administration of justice aside from  
6           when it investigates and tries cases of impeachment and when  
7           it acts as a judge of elections returns and qualifications  
8           of its own members because, as a matter of separation of  
9           powers, that is not what Congress does.

10           Defendant argues this language means that even in  
11           this very courthouse -- and I'm quoting from the defendant's  
12           briefing, "It has been held that Congress does not engage in  
13           the administration of justice."

14           *Montgomery* is irrelevant to the question of  
15           whether the SOCs in the guideline at 2J1.2 for interfering  
16           with the administration of justice apply to obstruction of a  
17           congressional proceeding. The issue in *Montgomery* was not  
18           how to interpret the meaning of the phrase "administration  
19           of justice," but to determine whether Congress's  
20           certification of the Electoral College votes constituted an  
21           official proceeding of Congress for purposes of the  
22           obstruction statute at 18 U.S.C. Section 1512(c) (2) to  
23           resolve a defendant's motion to dismiss that count of the  
24           indictment.

25           The phrase "administration of justice" does not



1 even appear in the statute that was under scrutiny by Judge  
2 Moss in *Montgomery*. Thus, *Montgomery* had nothing to do with  
3 the guidelines.

4 As the government points out, the court in  
5 *Montgomery* said nothing about the meaning of "administration  
6 of justice" as used in the guideline at 2J1.2, which applies  
7 to a broad swath of obstruction statutes that reach  
8 obstruction of nonjudicial proceedings, or any other  
9 guideline.

10 In fact, the same judge, Judge Moss, who issued  
11 the *Montgomery* decision, has applied the 3-offense level SOC  
12 to a defendant for his conduct at the Capitol on  
13 January 6th, in *U.S. v Hodgkins*, 21-CR-188 and -- based on  
14 the hearing this morning -- apparently, Judge Moss has also  
15 applied it in another case earlier this week -- in *Miller*.

16 Notably, as I will discuss in more detail shortly,  
17 in understanding the meaning of the phrase "administration  
18 of justice," in the guideline at 2J1.2, where the actual  
19 nature of the proceeding is relevant rather than the --  
20 where the proceeding takes place. On this point, I want  
21 to -- you point to another part of the *Montgomery* decision,  
22 which I think is actually more probative here about the  
23 nature of the proceeding that was at stake on January 6th.

24 *Montgomery* emphasizes the ways that the January 6,  
25 2021, proceeding before Congress had, "All the trappings of

1 a formal hearing before an official body" engaged in a  
2 fact-finding process.

3 Specifically, *Montgomery* notes that the  
4 certification process, "Requires the Congress formally to  
5 convene to conduct official business, to consider  
6 objections, and to render a final decision" at a specific  
7 "time, hour and place" with the Vice President as the  
8 "presiding officer."

9 It also sets a process for opening, presenting,  
10 and acting upon the certificates of the electoral votes, and  
11 provides rules for propounding or resolving objections, with  
12 each House withdrawing to its own chamber to debate the  
13 objection and render a decision.

14 Furthermore, the certificates and papers  
15 purporting to be certificates of the electoral votes are  
16 akin to records or documents that are produced during  
17 judicial proceedings, and any objections to these  
18 certificates can be analogized to evidentiary objections.

19 All of these features of the congressional  
20 proceeding to count Electoral College votes fall easily  
21 within the contours covered by the phrase "administration of  
22 justice."

23 Next, the defendant suggests that the SOC's in  
24 Section 2J1.1 -- 1.2, originated before the official  
25 proceeding provision was added to the statute in Section

1 1512 in 2002 with the Sarbanes-Oxley Act, and were never  
2 amended to encompass the concept of an official proceeding  
3 under Section 1512.

4 Based on this understanding of the legislative  
5 history and chronological development of the guidelines, the  
6 defendant concludes that the SOC's were not drafted to apply  
7 to congressional proceedings. See the defendant's memo at  
8 pages 13 and 14. This argument simply has the legislative  
9 history for the statute and the guidelines wrong.

10 The term "official proceeding," in its definition  
11 as a proceeding before the Congress, has appeared in the  
12 statute 18 U.S.C. Section 1512 since the statute was enacted  
13 in 1982, as part of the Victim and Witness Protection Act of  
14 1982; two years before any guidelines were even first  
15 promulgated.

16 A straightforward, chronological understanding of  
17 the statute and the guideline leads to the contrary  
18 conclusion that the defendant reaches; specifically, that  
19 Section 2J1.2, and its SOC enhancements, are applicable to  
20 all of the statutes to which it specifically references,  
21 including all convictions under 18 U.S.C. Section 1512,  
22 including those arising from obstruction of official  
23 proceedings of Congress.

24 The legal arguments put forward by Defendant to  
25 support the position that the phrase "administration of

1 justice" in the guideline at 2J1.2 does not apply to  
2 obstruction of congressional proceedings, simply do not hold  
3 up under scrutiny.

4 The defendant's position must be rejected for  
5 several other reasons as well.

6 First, as I just mentioned, the offense to which  
7 the defendant pled guilty in Count 2, obstructing,  
8 including -- obstructing and impeding an official  
9 proceeding, that is -- a proceeding before Congress under  
10 Section 1512(c)(2), is explicitly referenced to and covered  
11 by the guideline at 2J1.2 when the guidelines were first  
12 promulgated.

13 And his understanding of "administration of  
14 justice" is so limited that, if its narrower interpretation  
15 were correct, this phrase pertains only to court and grand  
16 jury proceedings and quasi-administrative proceedings; the  
17 SOC enhancements would not apply to numerous other statutes  
18 referred to this guideline.

19 As the government points out, if Defendant were  
20 correct, this guideline and SOCs might not apply to a number  
21 of other statutes covered by the guideline including:  
22 18 U.S.C. Section 551, concealing or destroying invoices or  
23 papers relating to imported merchandise; Section 1516,  
24 obstruction of a federal audit; 1519, destruction of  
25 documents in an agency investigation, or 26 U.S.C. Section

1       7212, interfering with administration of the internal  
2       revenue code.

3               There is simply no indication in guideline  
4       Section 2J1.2 that the SOC's containing the phrase  
5       "administration of justice" were meant to apply to only some  
6       of the statutes referenced to this guideline and not to  
7       apply to all of the cases involving obstruction of  
8       proceedings taking place outside of courts or grand juries;  
9       that simply doesn't make sense.

10              So now let's turn to the phrase itself, "the  
11       administration of justice," which Defendant argues is  
12       limited to these judicial or quasi-judicial proceedings.

13              To be sure, no definition of this phrase,  
14       "administration of justice" is set out in the guidelines.  
15       And perhaps -- should the sentencing commission be fully  
16       staffed again with actual commissioners who can conduct  
17       business, perhaps the guideline at 2J1.2, in its  
18       definitions, could be made clearer, and more explicitly  
19       cover obstruction of official government proceedings,  
20       including congressional proceedings that occur outside  
21       courts, grand juries, or agency adjudications.

22              Yet, the lack of express reference to  
23       congressional proceedings does not mean that the sentencing  
24       commission meant to exclude such proceedings from the  
25       coverage of the SOC's with use of the phrase "administration

1 of justice." This phrase is sufficiently broad to encompass  
2 nonjudicial official proceedings, such as Congress's  
3 certification of the Electoral College votes -- results.

4 And the background notes to the guideline at 2J1.2  
5 explain that the nature of "obstruction of justice," is  
6 intended to be understood broadly. There are numerous  
7 offenses of varying seriousness that may constitute  
8 obstruction of justice as the list of the referenced  
9 offenses provided by the government already demonstrates.

10 The guideline -- the government cites several  
11 cases where the SOC's have been applied to offense conduct  
12 involving interference with nonjudicial proceedings and to  
13 obstruction that led to the government's expenditure of  
14 resources, including *U.S. v Ali*, a Seventh Circuit case from  
15 2017; *U.S. v Atlantic States Cast Iron Pipe Company*, a  
16 District of New Jersey case from 2009 where the J1.2  
17 guideline SOC's were applied based on the defendant's  
18 interference with OSHA investigations into a workplace  
19 accident; and other cases.

20 The defendant points out that these cases are  
21 related, however loosely, to judicial proceedings such that  
22 the government has failed to show through its own cases  
23 cited that the administration of justice was meant to  
24 include nonjudicial proceedings. See the defendant's  
25 supplemental memo at 2 and 5.

1           These cases do show that the SOC's have generally  
2       been applied to proceedings that have some kind of nexus --  
3       a close nexus to a judicial or administrative hearing; they  
4       do not tell us that these SOC's cannot apply to the  
5       defendant's conviction for obstruction of an official  
6       congressional proceeding through his involvement in the  
7       Capitol riot.

8           The events of January 6th were as novel as they  
9       were serious, and so the lack of precedent applying this SOC  
10      to similar congressional proceedings is unsurprising, and  
11      not determinative.

12          The government points to other January 6th-related  
13      cases where other judges on this court have applied either  
14      or both SOC's based on the defendant's obstruction of the  
15      congressional proceeding, citing the case of *Scott Fairlamb*,  
16      at 21-CR-120; *Jacob Chansley*, at 21-CR-3; and *Paul Hodgkins*,  
17      21-CR-188; and now, I guess at this hearing, *U.S. v Miller*  
18      before Judge Moss. There is also *U.S. v Wilson*, 21-CR-345.

19          The defendant rightly notes that for the  
20      defendants in all of these cases -- except *Miller*, which was  
21      discussed and brought up today -- the defendants in the  
22      cases were subject to plea agreements, and so the Court was  
23      not presented with a dispute to resolve with respect to  
24      application of those SOC's in those cases.

25          As I have mentioned, the guidelines themselves do

1 not provide a definition of "administration of justice"; and  
2 *Black's Law Dictionary* defines the phrase "administration of  
3 justice" broadly to mean, and I quote, "the maintenance of  
4 right within a political community by means of the physical  
5 force of the state; the state's application of the sanction  
6 of force to the rule of right." In other words, that the  
7 state would use mechanisms, such as the police or  
8 prosecutors, to force compliance with or maintain a right;  
9 that is not necessarily tied to a court or a particular  
10 tribunal.

11 In a closely-related definition, *Black's Law*  
12 *Dictionary* defines the phrase "due administration of  
13 justice" to mean -- and I quote, "the proper functioning and  
14 integrity of a court or other tribunal and the proceedings  
15 before it in accordance with the rights guaranteed to the  
16 parties." Again, this phrase is not necessarily tied to a  
17 court of law, but also applies to any other tribunal.

18 The case law also provides some definitions of  
19 administration of justice. One court, the Second Circuit,  
20 in the *Rosner v United States* case described this phrase to  
21 mean: Performing acts or duties required by law.

22 Another Fifth Circuit case from 2012, *U.S. v*  
23 *Richardson*, defined, "due administration of justice," as I  
24 quote, "The performance of acts required by law in the  
25 discharge of duties such as, but not exclusively, appearing



1 as a witness and giving truthful testimony when subpoenaed."

2 Again, these case law definitions do not tie the  
3 performance of acts or duties required by law to proceedings  
4 in a courthouse.

5 The question for the Court to resolve then is the  
6 kind of activity Congress was engaged in on January 6, 2021,  
7 covered by the phrase "administration of justice"?

8 As the defendant concedes, the certification  
9 process was a proceeding before Congress and, therefore, an  
10 "official proceeding" for purposes of 18 U.S.C. Section  
11 1512(c)(2), as I and other judges on this court have  
12 uniformly held.

13 He argues that, and I quote, "No stretching of the  
14 definition of justice could lead to the conclusion that  
15 'administration of justice' was meant to apply to the  
16 certification of an election because it was not sufficiently  
17 judicial or quasi-judicial." See his supplemental memo at  
18 page 3.

19 Clearly, the certification of the Electoral  
20 College votes did not take place before a court of law or an  
21 executive agency adjudicator, and for the defendant that  
22 settles the matter.

23 Construing the phrase "administration of law," in  
24 so limited a fashion as Defendant has done, is not that  
25 simple. While the congressional certification of the

1 Electoral College results may not be the first thing that  
2 comes to mind, as I've said, when one contemplates "the  
3 administration of justice," the certification process  
4 involves members of Congress convening to fulfill a duty  
5 established under the Constitution and federal law. In  
6 other words, to perform acts or duties required by law, as  
7 the Second Circuit in *Rosner* and the Fifth Circuit in  
8 *Richardson*, so defined the term.

9 The certification requirement is, in fact, a  
10 formal peaceful process to resolve any disputes over the  
11 counting of Electoral College votes for President.

12 As Judge Moss detailed eloquently in *Montgomery*,  
13 and as I have already described, this process of dispute  
14 resolution provides an opportunity for objections to be  
15 raised to count any state's Electoral College votes, an  
16 opportunity for discussion and adjudication before the  
17 process is completed.

18 This has been, in the past, a largely *pro forma*  
19 process, but it has always demanded that Congress engage in  
20 the process according to set rules for resolving objections,  
21 before the final vote is counted, the winner declared and  
22 certified as the next President of the United States.

23 We may not always think about the administration  
24 of justice and the democratic process being so closely  
25 intertwined, but what Congress was doing on January 6, 2021,

1 was recognizing, protecting, and upholding the democratic  
2 choices of millions of voters across each of the states, as  
3 it heard and resolved objections to the certification of any  
4 state's exercise of their electoral votes.

5 Congress was convened to ensure that the official  
6 results of the presidential election accurately reflected  
7 the choices that had been made weeks earlier at the ballot  
8 box. The successful completion of that process is a stable  
9 basis upon which the authority of the incoming President is  
10 built.

11 Congress's tasks on January 6, 2021, fit easily  
12 into the definition courts have given to the phrase  
13 "administration of justice." When Congress convened to  
14 count the Electoral votes, by "performing acts or duties  
15 required by law," Congress was maintaining "the right within  
16 a political community," as *Black's Law Dictionary* states, to  
17 have votes counted in a particular manner, using "the  
18 physical force of the state" in the form of law enforcement  
19 officers located in and around the Capitol to secure the  
20 proceedings; though that security was severely tested and  
21 breached by the actions of the defendant and others who  
22 illegally entered the Capitol that day.

23 The constitutionally mandated procedure falls  
24 within the meaning of the phrase "administration of  
25 justice."

1           Causing or threatening injury to persons or  
2           property to obstruct justice is just as serious when the  
3           justice involves the fair and proper administration of the  
4           laws governing congressional proceedings as when it concerns  
5           courtroom proceedings. For these reasons, both SOC's are  
6           applicable to Defendant's conduct on January 6th.

7           I need to address the last argument or objection  
8           that the defendant raised in the supplemental briefing that  
9           the 3-offense level SOC under the guideline at 2J1.2(b) (2)  
10          does not apply because there was no substantial interference  
11          with the administration of justice.

12          The defendant argues it doesn't apply because, in  
13          order for the enhancement to apply, the government must  
14          identify a particular expenditure of governmental resources  
15          which but for the defendant's conduct would not have been  
16          expended, and which is substantial in amount. See the  
17          defendant's supplemental memo, at page 12, citing *U.S. v*  
18          *Tackett*, the Sixth Circuit case from 1999. And he argues  
19          that the government has offered no support that it was his  
20          conduct that specifically caused the need for these  
21          resources to be expended.

22          *Tackett* itself -- the Sixth Circuit case from  
23          1999 -- cites a district court case, *U.S. v Weissmann*, a  
24          Southern District of New York case from 1998, as support for  
25          its enumeration of these three requirements for application

1 of this SOC. In *Weissmann*, the court listed, without  
2 citation, the same three requirements which it says it had  
3 deduced from other decisions; and, in a footnote, explained  
4 that the purpose of the second element -- the but-for  
5 element -- was to give meaning to the requirement in the  
6 guideline application notes that the expenditure of  
7 substantial governmental resources be unnecessary.

8 This but-for requirement has not been interpreted  
9 to create an inflexible cause-in-fact standard, where the  
10 enhancement may only be applied where the government can  
11 show that a defendant's own actions were the single direct  
12 reason for the substantial government expenditure.

13 Rather -- based on the text of the guideline  
14 itself -- there must be a general causal tie between the  
15 defendant's actions and the otherwise unnecessary  
16 expenditure. See *U.S. v Gray*, Sixth Circuit case from 2012,  
17 affirming application of the 2J1.2(b)(2) SOC where the  
18 defendant's falsification of documents "albeit" -- and I  
19 quote, "Not standing alone, made the investigation into the  
20 victim's death more difficult and delayed Defendant's trial  
21 for four years."

22 This SOC is applied in cases where multiple  
23 defendants engaged in obstructive conduct, where pure  
24 but-for causality tied to a specific defendant's personal  
25 actions would be difficult to prove. See, for example,

1     *U.S. v Atlantic States Cast Iron Pipe Company*, 627  
2     F.Supp. 2d 188, District of New Jersey, 2009.

3             Where, as here, the defendant acted in concert  
4     with hundreds of other rioters to obstruct congressional  
5     proceedings; no one person in the crowd could have created  
6     the same degree of havoc, chaos, and disruption as the  
7     collective group did, and the government need not  
8     demonstrate a specific defendant as singularly responsible  
9     for the unnecessary expense.

10            Instead, the government need only show a direct  
11    causal line from all of the participants in the mob, which  
12    includes a specific defendant, that collectively resulted in  
13    a situation causing the unnecessary expenditure of  
14    substantial governmental resources.

15            As for the defendant's assertion there is no  
16    "proof" -- quote, "that he was aiding and abetting any of  
17    the other individuals present that day" or "had the same  
18    intentions" of others who stormed the Capitol, this is  
19    belied by the video evidence in this case.

20            During the melee in the Rotunda, for example, the  
21    defendant used the means available to him -- his water  
22    bottle, his voice, his body -- to contribute to the chaos  
23    and continue the breach of the Capitol, thereby delaying the  
24    completion of the Electoral College vote.

25            Whatever his intentions were when he arrived in

1 the Capitol that day, the videos make clear that this  
2 defendant was an active participant in the breach,  
3 contributed to the violence against police officers that  
4 day; and but for the actions of the rioters that day, the  
5 hundreds of law enforcement officers and National Guard  
6 members called in to address the situation would not have  
7 been necessary; nor would the hundreds of thousands of  
8 dollars of repairs to the Capitol have been necessary.

9 His conduct contributed to this unnecessary  
10 expenditure of substantial governmental resources during and  
11 after the riot, and resulted in substantial interference  
12 with the administration of justice. Therefore, his actions  
13 sit firmly in the category of serious offense conduct which  
14 the sentencing commission determined merited greater  
15 punishment.

16 As a final point, even if this Court were to find  
17 that SOCs predicated on the administration of justice did  
18 not apply to a congressional proceeding to certify Electoral  
19 College votes, this Court is fully authorized, under the  
20 guidelines in determining the appropriate sentence to  
21 impose, to consider, without limitation, any information  
22 concerning the conduct of the defendant, unless otherwise  
23 prohibited by law. See the guideline at 1B1.4.

24 The Court is not precluded from considering  
25 information that the guidelines do not take into account in

1 determining a sentencing within the guideline range or from  
2 considering that information determining whether and to what  
3 extent to depart from the guidelines because the guidelines  
4 were designed to address the heartland of typical cases  
5 embodying the conduct each guideline describes.

6 Where conduct significantly differs from the norm,  
7 the Court is not limited by what is provided in the  
8 guidelines but may, in such unusual cases, impose a sentence  
9 outside the recommended sentencing range. And what happened  
10 on January 6, 2021, was outside the norm and outside the  
11 heartland of cases -- in fact, the first time in our history  
12 where the peaceful transition of power to a new  
13 administration was disrupted by mob action attacking the  
14 Capitol.

15 So even if defendant were correct -- which he is  
16 not -- that the SOC's in the guideline 2J1.2 did not cover  
17 congressional proceedings, these SOC's capture specific harms  
18 warranting an increase in sentence severity, like causing or  
19 threatening physical harm to another person or so  
20 interfering with a proceeding as to result in the unexpected  
21 expenditure of substantial government resources; and those  
22 specific harms may, by analogy, apply equally to the offense  
23 conduct that occurred against our legislative branch of  
24 government on January 6, 2021, and warrant corresponding  
25 increases in the severity of the sentence by way of a



1 departure or a variance.

2 Okay. Now, having resolved the objections to  
3 those SOC's, that also resolves the defendant's objection  
4 that the guideline at Section 2A2.2 applies because based on  
5 my conclusion as to application of the two SOC's in 2J1.2,  
6 that guideline produces the highest offense level and will  
7 control the application of the guidelines and the  
8 appropriate sentencing range here.

9 So with those objections resolved, before I turn  
10 to the final calculation of the guidelines, I think I am  
11 going to take a short break because my court reporter needs  
12 to have a break, as well as I do.

13 Okay. So we'll take a five-minute break.

14 (Whereupon, a recess was taken.)

15 THE COURT: All right. So with those objections  
16 to application of the guidelines resolved, I will now review  
17 how the guidelines apply in this case.

18 The highest guideline offense level for the group  
19 counts is the guideline at Section 2J1.2, which provides a  
20 base offense level of 14 under 2J1.2(a); plus an additional  
21 8 offense levels under the SOC at 2J1.2(b)(1)(B) because the  
22 offense involved causing or threatening physical injury to a  
23 person, or property damage, in order to obstruct the  
24 administration of justice; and 3 offense levels under the  
25 SOC at the guideline 2J1.2(b)(2) because the offense

1       resulted in the substantial interference with the  
2       administration of justice, specifically the proceedings of  
3       Congress. This results in an adjusted offense level of 25,  
4       which is reduced by 3 offense levels for acceptance of  
5       responsibility for the offense, under the guideline at  
6       Sections 3E1.1(a) and 3E1.1(b); and a total offense level of  
7       22, in combination with a Criminal History Category of 1  
8       produces an advisory guidelines range of 41 to 51 months  
9       imprisonment.

10               However, for Counts 4, 5, and 6, the maximum  
11       sentence that may be imposed is 12 months per count based on  
12       the statutes of conviction; and the defendant is also  
13       subject to a supervised release range following imprisonment  
14       of 1 to 3 years, and a guideline advisory fine range of  
15       15,000 to \$150,000. The special assessment is \$100 for each  
16       of Counts 1 through 3; \$25 for each of Counts 4, 5, and 6;  
17       and \$10 for each of Counts 7 through 10; for a total special  
18       assessment of \$415.

19               So before I turn to consideration of the  
20       defendant's request for a downward departure under  
21       5K2.0(a)(3), let me just hear from the parties whether there  
22       are any objections, for the record, about this guideline  
23       determination not already noted on the record from the  
24       government.

25               MR. EDWARDS: No, Your Honor.

1 THE COURT: And, Mr. Matera.

2 MR. MATERA: No, Your Honor.

3 THE COURT: All right. So, Mr. Matera, I know you  
4 have raised a motion for a downward departure for a sentence  
5 below the guideline range of 41 to 51 months under  
6 5K2.0(a)(3), and you ask that he be sentenced to 12 months  
7 of home incarceration. Do you -- and I think your argument  
8 for that is that he should be given credit for his early  
9 guilty plea.

10 And if you want to step forward and make your  
11 arguments for the downward departure, I will hear you.

12 MR. MATERA: Judge, that was, in part, based on  
13 our hope of having succeeded in our argument.

14 THE COURT: Of course.

15 MR. MATERA: So, obviously, we understand that our  
16 request may be changed slightly. But, yes, we are  
17 requesting a downward departure based on my client's  
18 circumstances as set forth in our sentencing memoranda that  
19 we had submitted to the Court.

20 My client is a 26-year-old young man; obviously, a  
21 very impression- --

22 THE COURT: Well, before you get to the  
23 Section 3553(a) factors, my understanding is that you were  
24 seeking the motion for a downward departure, which I am  
25 required to address because of his acceptance of

1 responsibility --

2 MR. MATERA: Yes.

3 THE COURT: -- because he had -- because he had  
4 eaten the whole indictment, for example.

5 MR. MATERA: Right. Correct.

6 THE COURT: And so I was a little bit puzzled  
7 about this, about why it is he needed this extraordinary  
8 downward departure for acceptance of responsibility beyond  
9 three-offense levels already provided in the guideline  
10 calculation.

11 MR. MATERA: Right. Sure. As Your Honor has  
12 stated -- and no one will dispute this, obviously -- the  
13 events that took place on January 6th, obviously, were a  
14 dark spot on our country's history.

15 Mr. Rubenacker has deeply regretted his  
16 involvement -- until this day continues to deeply regret his  
17 involvement. From the very beginning of this case, when he  
18 first contacted me at least, he has always expressed his  
19 intent -- his regret and also his intention to resolve this  
20 case quickly and take responsibility for his actions.

21 THE COURT: But he was arrested in February 2021.

22 MR. MATERA: Correct.

23 THE COURT: And he pled guilty in February 2022, a  
24 year later.

25 MR. MATERA: Correct.

1           THE COURT: I have people who -- between arrest  
2           and the time they enter their plea, it's like less than  
3           three months. So I looked -- I went and checked; was like:  
4           How prompt was this plea? And a year is not prompt.

5           MR. MATERA: Well, not prompt as far as time goes.  
6           But this case involved situations where the government was  
7           in the process of getting us documentation, getting us  
8           videos which, as Your Honor is aware, took an exceptionally  
9           long time.

10          When Mr. Rubenacker was first arrested, he was not  
11          charged with all of the -- with the obstruction and the  
12          assault, so those charges came down the road. So it wasn't  
13          completely a one year of those charges standing that he was  
14          still deciding what to do.

15          THE COURT: Yes. Is the moral of the story is  
16          when you're only charged with misdemeanors -- because the  
17          government is still sifting through terabytes of video --  
18          you should take that plea offer as promptly as possible  
19          because it's only going to get worse for you?

20          MR. MATERA: Understandably, there was no plea  
21          offer at that point in time. Mr. Rubenacker, being a  
22          resident of the state of New York, was detained there and  
23          was brought to the Eastern District of New York where we,  
24          ultimately, had a removal proceeding. So we didn't even get  
25          to speak to anyone who would be handling this matter until

1 at some point down the road after we agreed to the removal  
2 proceeding.

3 So there was never a misdemeanor offer made; that  
4 was just, ultimately, what was stated by the Assistant  
5 United States Attorneys in the Eastern District of New York.  
6 Certainly, we weren't in a position to take any kind of plea  
7 at that point in time; it was only after that that we were  
8 made aware of Mr. Rubenacker's other charges or what,  
9 ultimately, became his indictment on these additional  
10 charges. And myself, as an attorney, obviously requested to  
11 view the videos just so I could give adequate representation  
12 to my client and confirm, yes, this does make out the  
13 charge; this is what we need to do. That's more on me than  
14 it is on my client. My client did want to plead guilty. He  
15 didn't understand, obviously, the full nature of all of the  
16 charges at that point in time.

17 So once we did get all of the videos, and we sat  
18 down -- we went through it. We even sat down with the  
19 government through a reverse-proffer situation so that he  
20 fully understood and, even then, was adamant that this was  
21 something that he wanted to accept responsibility for and  
22 plead guilty to. So I do understand what Your Honor is  
23 saying, that it was 12 months; but it wasn't 12 months of  
24 everything being equal. It was 12 months of getting all of  
25 the discovery which, again, understandably took an

1       exceptionally long period of time.

2               And once we -- it wasn't just a matter of getting  
3       the videos, it was also a matter of getting the videos -- as  
4       Your Honor I am sure is well aware, there must be thousands  
5       and thousands of hours of video -- and then getting the  
6       videos and then determining which ones include  
7       Mr. Rubenacker, and parsing all of that out. That  
8       contributed to the time between when he had indicated to me  
9       that he wanted to resolve this, and when we, ultimately,  
10      were able to do so.

11              There was also a delay, again, because of a  
12      disagreement between counsel and the government. The  
13      government had made their plea offer -- I want to say --  
14      July or August. Mr. Rubenacker was amenable, but we had  
15      this dispute over the offense levels. Again, nothing that  
16      Mr. Rubenacker even understood as much as I explained it to  
17      him, and then he, obviously, did understand what we were  
18      arguing over. But it wasn't anything of him not saying:  
19      Let's go ahead and plead guilty. He had always said that  
20      from the beginning; it was just getting through all of the  
21      legalese. And, ultimately, as Your Honor indicated, he  
22      showed how much he wanted to accept responsibility by  
23      pleading guilty to the entire indictment.

24              When we could not come to an agreement despite --  
25      and I am sure Mr. Edwards would agree -- despite several

1 months of trying to come to an agreement -- when we couldn't  
2 get to that point, he nevertheless still said to me: Mike,  
3 I want to turn around and resolve this; let's let the judge  
4 know. What can I do? And I explained to him his rights,  
5 and that would include pleading to the entire indictment  
6 which, obviously, would allow him to maintain his right of  
7 appeal and his right to dispute those objections; and that's  
8 what we did. So that's the only reason why there was the  
9 delay that Your Honor sees.

10 THE COURT: All right.

11 MR. MATERA: Okay.

12 THE COURT: Thank you, Mr. Matera.

13 Mr. Edwards, do you want to respond?

14 MR. EDWARDS: Yes, Your Honor.

15 So the defendant is right, he did plead guilty;  
16 and he got a minus three for that.

17 So just to orient the Court -- I am sure the Court  
18 is aware: His guidelines would have been 57 to 71. And now  
19 his guidelines, after the resolution of the objections, are  
20 41 to 51. The top end -- from top to bottom, that's a  
21 30-month difference; that's a benefit, and the government  
22 doesn't disagree with that benefit.

23 In terms of finding some middle ground between  
24 pleading guilty and getting his minus three and providing  
25 substantial assistance to the government, which -- our door



1 is always open; he was more than welcome to come in and talk  
2 to us about people around him, that area does not exist.  
3 The government just respectfully disagrees that anything is  
4 more warranted than the minus three here.

5 THE COURT: All right. Thank you.

6 MR. MATERA: May I please?

7 THE COURT: Yes. Mr. Matera, anything further?

8 MR. MATERA: Sure.

9 Just so we're clear, at no time was it requested  
10 that Mr. Rubenacker provide any additional information nor,  
11 for that matter, did he have any more than what the video  
12 showed. But he never once said: No, I am not willing to  
13 come and talk to the government.

14 In fact, as I am sure Your Honor has read in my  
15 papers, he did cooperate and did give truthful testimony  
16 before the House Select Committee. So to suggest that he  
17 wasn't willing to come in and say something about what  
18 happened and what was going on with those around him, I can  
19 assure you that although it was never asked of us by the  
20 Department of Justice, it was asked of us and it was given  
21 in a rather lengthy testimony before the House Select  
22 Committee. I have not had the opportunity to review the  
23 transcript; they actually just contacted me yesterday to  
24 tell me. I'm making arrangements to do so. But  
25 Mr. Rubenacker was --

1 THE COURT: When did he do that?

2 You make a passing reference to him talking to the  
3 House Select Committee, but you don't --

4 MR. MATERA: It was right after --

5 THE COURT: -- give me a date or any other details  
6 about it.

7 MR. MATERA: Sure. It was right after -- about  
8 three weeks -- I have the exact date on my computer, I can  
9 check for you; but it was about three or four weeks after  
10 the plea was entered. Obviously, they wanted to wait  
11 because we were working out the plea deal -- until that was  
12 done; but he did give truthful testimony.

13 He was questioned for several hours about  
14 everything from what happened outside -- or what was going  
15 on outside the Capitol Building as far away as the time of  
16 then-President Trump's speech and what was happening there,  
17 what led to the walk towards the Capitol and, ultimately,  
18 the entry into the Capitol, and everything that was going on  
19 inside. So all of that was gone through in extensive  
20 detail. So, again, it has never been a situation where  
21 Mr. Rubenacker was not willing and ready to come in and help  
22 out in any way that he could; he did, as soon as he was  
23 asked.

24 THE COURT: All right. Thank you.

25 MR. EDWARDS: Your Honor, May I respond?

1           Unless Your Honor has any questions, I am happy to  
2     respond --

3           THE COURT:   You can respond briefly.

4           MR. EDWARDS:   Just briefly, in terms of never  
5     having been asked, the government has been involved in a  
6     number of cooperation plea agreements that have been very  
7     public; I myself have been part of three of those as they  
8     relate to January 6th.  It was readily apparent to anyone  
9     paying attention that the government's door is open and  
10    people should cooperate.

11           As it relates to having never asked  
12    Mr. Rubenacker, I am not sure the government needs to -- I  
13    don't understand the point that the government needs to ask  
14    him to be remorseful and come in and cooperate; he should be  
15    willing to do that if he thinks that a significant downward  
16    variance is warranted based on that cooperation.

17           Second, as to the House Select Committee  
18    cooperation -- it's a different branch.  The government nor  
19    does the Court have any way of vetting this cooperation,  
20    whether it was truthful or accurate.  I don't mean to in any  
21    way say Mr. Matera is not telling the truth, we just don't  
22    have any way to verify the trust, or verify the process.  
23    The government has been clear throughout, whenever having  
24    conversations with Mr. Matera, that it would not play any  
25    role in the government's handling of this case.

1 Thank you.

2 THE COURT: All right. Thank you.

3 All right. So the defendant has requested a  
4 downward departure under the guideline at 5K2.0(a)(3), which  
5 provides for departures based on circumstances present to a  
6 degree not adequately taken into consideration in  
7 exceptional cases.

8 Let me point out that the probation office that  
9 conducted a presentence investigation report identified no  
10 circumstances warranting a departure or a variance. See the  
11 PSR, at paragraph 150.

12 And the basis for this extraordinary downward  
13 departure according to the defendant is that he was willing  
14 to accept a plea early on, as well as his rehabilitative  
15 potential due to his lack of prior criminal history, and his  
16 cooperation with the House Select Committee; and the Court  
17 will deny this request for a downward departure.

18 The guideline determination is already made to  
19 take full account of the defendant's lack of criminal  
20 history; it also takes account the fact that he accepted  
21 responsibility for his criminal conduct by entry of his  
22 guilty pleas about one year after his arrest. This is not a  
23 context that presents such a set of exceptional  
24 circumstances to warrant application of a downward departure  
25 under the guideline at 5K2.0(a)(3).

1 I do appreciate that he has spoken to the House  
2 Select Committee and, for that reason, I will take that into  
3 account in deciding where within the guidelines to impose a  
4 sentence.

5 Okay. We're now at the third step of the  
6 sentencing hearing; and I have been provided with divergent  
7 sentencing recommendations in this case.

8 The government recommends 46 months' imprisonment,  
9 at the midpoint of the applicable guideline range of 41 to  
10 51 months, followed by a period of 36 months' supervised  
11 release, and \$2,000 in restitution. The probation office  
12 recommends 41 months' imprisonment, at the low end of the  
13 guideline range, also followed by 36 months of supervised  
14 release; and the defendant recommends 12 months of home  
15 confinement.

16 So, with that, I am going to start with the  
17 government to talk about application of the 3553(a) factors.

18 MR. EDWARDS: Yes, Your Honor. If I could have  
19 one minute to just set up my laptop.

20 THE COURT: Sure.

21 MR. EDWARDS: Thank you.

22 THE COURT: You are not showing a PowerPoint, are  
23 you?

24 MR. EDWARDS: I have the exhibits -- some of the  
25 exhibits --

1           THE COURT: I see, okay. Go ahead.

2           MR. EDWARDS: It's in the form of a PowerPoint;  
3 just videos on slides that I have already provided to  
4 counsel and the Court. But if -- I know the Court has  
5 reviewed them, so I can maybe just breeze through a few of  
6 them.

7           THE COURT: Okay.

8           MR. EDWARDS: Okay. Thank you, Your Honor.

9           So I want to actually make sure you can see this.  
10 Is Your Honor able to see the --

11          THE COURT: I am.

12          MR. EDWARDS: Great.

13          So the government intended today to just walk  
14 through a few of the exhibits; a number of them are on these  
15 slides. Having engaged in lengthy dialogues with the Court  
16 about some of them, I am happy to skip a few.

17          I think it's important -- at least for the  
18 purposes of the government's recommendation of 46 months of  
19 imprisonment within the guidelines, and 36 months of  
20 supervised release, and \$2,000 of restitution -- that the  
21 Court understand this defendant's behavior within the  
22 context of January 6th.

23          I believe the Court has already reviewed this. I  
24 think this will aid the government's ability to just talk  
25 about the gravity of what was going on that day. So, to

1 start, Exhibit 1, which was -- all of these have been  
2 provided to defense and the Court.

3 The defendant's own phone -- the defendant  
4 recorded a lot of his conduct on January 6th and,  
5 ultimately, pieced together a number of videos in what's  
6 known as a Snap Story on Snapchat, which is a social media  
7 provider.

8 This video is just going to be a very quick  
9 Snapchat of everything he experienced that day. And it  
10 shows you, frankly, in the government's opinion, the  
11 flippant attitude that the defendant had toward January 6th  
12 by taking these videos and posting them on his Snapchat  
13 Story. So I will play that now and, hopefully, the audio  
14 will work.

15 (Whereupon, a video, Exhibit 1, was published.)

16 MR. EDWARDS: So what Your Honor sees here is a  
17 series of videos in which the defendant recognizes that  
18 America is pissed, and follows that group of individuals  
19 around him toward the United States Capitol Building. And  
20 he eventually then breaks into the Senate wing door on the  
21 north side of the United States Capitol. At about 2:13  
22 p.m., he is one of the first 50 rioters in the United States  
23 Capitol Building.

24 In no way, shape, or form are there any law  
25 enforcement officers around, as seen in the screenshot of

1 Exhibit 2. And there are videos that the government has  
2 provided that shows an outside perspective of those doors  
3 and an inside perspective at the time that Greg Rubenacker  
4 went inside that door. Law enforcement is not present;  
5 they're just not. No one is waving him in.

6 In fact, it's the opposite. There are rioters  
7 around Greg Rubenacker who are smashing the windows in and  
8 breaking the doors down. Greg Rubenacker must have seen  
9 that, he is in their presence and enters within the first 30  
10 to 40 seconds after 2:13 p.m.

11 So he goes inside and, as seen in that video,  
12 chants, "We took over the Capitol." "This is history." He  
13 knows the significance, he just has a different lens on it  
14 than the government does.

15 So, eventually, he -- this is the video that will  
16 show part of what is happening when Greg Rubenacker goes  
17 into the Capitol and immediately hangs a left and follows a  
18 group of people who start to accost Officer Eugene Goodman  
19 up the stairs. There are two videos; I think both of them  
20 are significant. I would like to talk about them after  
21 playing them.

22 (Whereupon, a video was published.)

23 MR. EDWARDS: As Your Honor can see, Greg  
24 Rubenacker is near the front of this group of individuals  
25 chasing Eugene Goodman up multiple flights of stairs while



1 Eugene Goodman is repeatedly telling them to back up.

2 There is no question what is going on here.

3 Officer Goodman told them they couldn't be there; and they  
4 decided that they outnumbered him, and so they chased him.

5 In fact, people yelled, "He is one, we are thousands." They  
6 started screaming, "Where are they counting the votes?"

7 "What are you going to do? Shoot us?"

8 That surrounding context around Greg Rubenacker  
9 makes crystal clear that he is not to be there and that he  
10 is part of this crowd by acting in concert with them when he  
11 continues up those stairs despite Officer Goodman's repeated  
12 refrains. This is another angle from Mr. Rubenacker's  
13 pursuit. This is from behind Officer Goodman, so you will  
14 be able to see Mr. Rubenacker in that same brown hood.

15 (Whereupon, a video was published.)

16 MR. EDWARDS: Your Honor, I will skip now to this  
17 photograph that was included in the government's sentencing  
18 memorandum.

19 This scene is significant. Greg Rubenacker joined  
20 this group of individuals chasing Officer Goodman up... And  
21 while identified in our sentencing memorandum what Officer  
22 Goodman was doing right before this -- confronting Senator  
23 Mitt Romney and others and telling them to turn around and  
24 get them to safety, it's important to note that about 40  
25 feet behind this person taking this photograph is the Senate

1 Chamber. That's not the only time that Greg Rubenacker  
2 comes so close to the Senate Chamber because he does so  
3 again at about 2:45 p.m., coming down another hall after he  
4 breaches again, which we'll talk about in a second; but that  
5 is significant.

6 January 6th these senators are to be part of a  
7 Joint Session standing on hallowed ground that people not  
8 even in tours or visits can be. Frankly, who knows what  
9 happens if Officer Goodman and these officers don't form a  
10 line and stop these rioters 40 feet from the Senate Chamber?  
11 That location is significant.

12 Instead, Mr. Rubenacker notices these officers.  
13 He doesn't turn around and say, jeez, I can't be here, this  
14 is not where I am supposed to be. Instead, he confronts  
15 them.

16 This photograph makes it clear. Rubenacker, he  
17 didn't even stay behind the crowd. He joined the front and  
18 he confronts them. It is not reasonable to believe that  
19 Mr. Rubenacker didn't know what was going on and was not  
20 phased by the things being yelled around him or what these  
21 circumstances were. Any reasonable person sees this and if  
22 they want to be law-abiding, they leave.

23 So Mr. Rubenacker decides to leave the Capitol  
24 Building and come back after confronting these officers.  
25 About 20 to 22 minutes later, he goes to the east Rotunda

1 doors which -- if you exit where he exited out of, the  
2 carriage doors, he takes a right and heads toward the long  
3 steps up to the Rotunda doors.

4           There are a number of videos -- I am not going to  
5 play these now -- except, maybe, about 30 seconds or so of  
6 one. It's important for the Court to realize what was  
7 happening at those Rotunda doors when he breached at about  
8 2:42 p.m. It is not a stream of people walking through the  
9 Rotunda doors; it's not officers up there waving people in.  
10 It is mayhem. There are assaults of officers; there are  
11 people kitted out in military gear traveling up -- a line up  
12 to the doors at that moment.

13           Greg Rubenacker is part of this mob of people who  
14 are throwing things at officers, throwing things at doors,  
15 picking up projectiles around them and throwing them. He is  
16 not alleged to have done that at these doors, but he's  
17 certainly alleged to have been there and seen all of that  
18 conduct and decided: I am going through those doors because  
19 they're open now.

20           So I will play just a few seconds of one video  
21 just to show a snapshot of what was happening to these  
22 officers and these doors about two minutes before  
23 Mr. Rubenacker enters them.

24           This is, for the record, Exhibit 18.

25           (Whereupon, a video, Exhibit 18, was published.)

1           MR. EDWARDS: Your Honor, we should look that  
2       conduct in the face and call it for what it is, it's  
3       unAmerican. It's disgusting. What Greg Rubenacker did was  
4       look that conduct in the face and enter the east Rotunda  
5       doors about two minutes later.

6           I am not going to play the CCTV. But Greg  
7       Rubenacker enters and immediately hangs a right. What he  
8       does is he goes towards the Senate hall; that's  
9       approximately 40 to 50 feet away from the same Senate  
10      Chamber doors that are on the other side of the same  
11      connecting L hallway where he went up, the first breach. I  
12      will show a photograph of that -- a slight video of that,  
13      Your Honor.

14           What occurs here -- what I would like to do is  
15      play a snapshot of what Mr. Rubenacker sees. When he enters  
16      this hallway, you will be able to see his brown hood from  
17      behind; it starts at the front to show you the law  
18      enforcement presence. If you will note, behind them is a  
19      brown door. At the end of this hallway is the Senate  
20      Chamber.

21           (Whereupon, a video, Exhibit 7, was published.)

22           MR. EDWARDS: The rest of Exhibit 7, Your Honor,  
23      shows law enforcement deploying chemical irritant spray to  
24      stop these rioters, including Mr. Rubenacker, from  
25      progressing any further. It is not reasonable to believe

1       that Mr. Rubenacker was swallowed as part of the crowd and  
2       just happened to be pushed forward in this hallway because,  
3       as the Court saw in Exhibit 6, from the east Rotunda doors  
4       CCTV, when he makes it inside, there is space; and he  
5       intentionally goes to the right. He goes toward the Senate  
6       hallway.

7               When he puts himself in a position to be in this  
8       narrow hallway, with a group of about 50 to 100 rioters  
9       screaming, "Fuck McConnell," he put himself in that  
10      position. It is not reasonable to believe any argument that  
11      Mr. Rubenacker didn't know what was happening and was caught  
12      up in the crowd but had no intention of going forward. He  
13      wasn't facing backwards and telling people to move; he was  
14      moving forward toward the Senate Chamber. That's the second  
15      time now within an hour that Mr. Rubenacker came this close  
16      to going toward the Senate Chamber doors.

17             So Mr. Rubenacker doesn't leave. He has now been  
18      part of a crowd that is hit with chemical irritant spray  
19      from officers clad in riot gear; and he goes into the  
20      Rotunda and lights up marijuana. He claims, in his  
21      sentencing memorandum, that he didn't bring the marijuana  
22      but somebody else handed it to him; that, in fact, is  
23      Nicolas Eduardo Alvear Gonzalez, which was a defendant of  
24      mine; that defendant did distribute marijuana. He's shown,  
25      in Mr. Rubenacker's Snapchat video, with American flag pants

1       and a cowboy hat on.

2               Mr. Rubenacker accepted the marijuana; he lit the  
3       marijuana; and he smoked the marijuana in the Rotunda.

4       Regardless of the Court's feelings on marijuana, this is  
5       smoking an illegal substance in a United States Capitol  
6       Building; I don't care what the substance is at that point.

7               He is now surrounded by other rioters who start to  
8       light up around him and he is flippantly treating this  
9       behavior as something worthy of putting on Snapchat and  
10      bragging about it; saying, "It smells like freedom in here."  
11      The same freedom that he becomes concerned about later when  
12      he starts texting people about betraying him when they talk  
13      about him publicly about what he did on January 6th.

14              What did he do after he smoked marijuana in the  
15      Rotunda? He sees a large amount of law enforcement officers  
16      enter one of the doors into the Rotunda -- clearly marked as  
17      officers, and he knows that. He approaches them and he  
18      records, on his cell phone, his conduct of those officers.

19              It is clear those officers are trying to clear the  
20      Rotunda, and he does not leave. He decides to call them  
21      "Communists," and he decides to accost them of who they  
22      serve because Mr. Rubenacker, in his words, is part of "We  
23      the people."

24              So who are the officers serving that day? They're  
25      serving the American public when they try to get people like

1 Mr. Rubenacker out of the Rotunda so we can move forward  
2 with a peaceful transfer of presidential power.

3 The body-worn camera captures Mr. Rubenacker's  
4 conduct. I think that's a better angle so we can see  
5 Mr. Rubenacker's demeanor.

6 (Whereupon, a video, Exhibit 10, was published.)

7 MR. EDWARDS: It is not reasonable to believe that  
8 Mr. Rubenacker did this because he witnessed officers  
9 conducting themselves in ways he disagreed with in that  
10 moment. Those officers just entered, as the Court saw, the  
11 Rotunda. He hadn't addressed anyone yet.

12 In fact, Mr. Rubenacker had already screamed at  
13 officers and attempted to get toward the Senate Chamber  
14 twice before he had seen officers approach or tackle or  
15 pepper spray anyone. So it is not reasonable to believe  
16 that Mr. Rubenacker conducted himself in this way solely  
17 because he disagreed with how the officers were handling the  
18 situation. What he disagreed with was the election. What  
19 he disagreed with was the officers not turning around and  
20 facing the Senate with him; he makes that clear in his own  
21 words.

22 There are other body-worn cameras that the Court  
23 has seen that I won't go through. Apologies. But I want to  
24 show one, Your Honor, that just shows the context around  
25 Mr. Rubenacker, which I think is relevant for when the Court

1 considers his conduct, especially in comparing it to other  
2 people's conduct.

3 This is not a group of peaceful protesters in the  
4 Rotunda when officers are trying to remove them and there  
5 are simply too many to remove, and so it becomes physical by  
6 nature because there is jostling.

7 These are two factions that are in opposition to  
8 one another. They line up, and they confront one another.  
9 Law enforcement is on the right side; these rioters are on  
10 the wrong side; and Mr. Rubenacker chose a side. So these  
11 videos will show, in part, what was going on there when  
12 Mr. Rubenacker made that decision.

13 (Whereupon, a video, Exhibit 11, was published.)

14 MR. EDWARDS: So, as the Court can see, hopefully,  
15 there, toward the end -- it's brief -- but Mr. Rubenacker is  
16 right there with his brown hood, red hat, in the bottom left  
17 of the screen, as he sees what plays out before him. That  
18 video shows the Court these two opposing factions and  
19 rioters screaming "Hold the line." This video happens to  
20 have a couple of clips that show more clearly what  
21 Mr. Rubenacker did to join that confrontation and hold the  
22 line.

23 Court's indulgence.

24 As the government has provided to the Court and  
25 defense counsel, there are a number of timestamps in these



1 exhibits that are particularly relevant; this is one of  
2 them. I will play Exhibit 20, from 16 minutes to 16 minutes  
3 and 30 seconds. Unfortunately, I will have to play it from here.

4 (Whereupon, a video, Exhibit 20, was published.)

5 MR. EDWARDS: What you will see, Your Honor, is  
6 Mr. Rubenacker joined in that same outfit and continued to  
7 use his force and his mask to support the rioters who are  
8 confronting the officers. He doesn't go toward one of the  
9 five to six exits in the Rotunda.

10 This is toward the left, at about -- the way I use  
11 it is at nine o'clock. So the furthest left center of the  
12 photo is a red hat; that's Mr. Rubenacker.

13 I am playing now, again, at 16 minutes and 11  
14 seconds.

15 (Whereupon, a video was published.)

16 MR. EDWARDS: Pausing now at 16 minutes 30  
17 seconds.

18 There is one additional snippet that the  
19 government would like to show; 15 minutes 30 seconds. I  
20 will go a little backwards here.

21 We'll pause here, at 15 minutes 12 seconds. In  
22 fact -- I'll ad lib here a little bit. I will go back to  
23 about 15 minutes 2 seconds; we'll play from here.

24 What you will see is what Mr. Rubenacker does when  
25 the law enforcement starts to grow in number and certainly

1 show -- present a show of force to prevent these rioters  
2 from going further into the Capitol. What you will see is  
3 Mr. Rubenacker, instead, take it on his own and approach  
4 them.

5 And then, in the following clip, it will show  
6 Mr. Rubenacker, again, participating with the rioters to  
7 stop the officers from successfully removing them.

8 (Whereupon, a video, Exhibit 20, was published.)

9 MR. EDWARDS: For the Court's awareness, that's  
10 Mr. Rubenacker in the center with the red hat and brown  
11 hood.

12 Playing, again, at 15 minutes 12 seconds.

13 (Whereupon, a video, Exhibit 20, was published.)

14 MR. EDWARDS: So I will pause now at 15 minutes 43  
15 seconds; I think it's sufficient.

16 What I wanted to show the Court, nothing about  
17 this is peaceful. It was mayhem. Mr. Rubenacker  
18 intentionally and repeatedly chose to join in that mayhem.

19 Your Honor, at some point, law enforcement decides  
20 to escalate and increase in number and remove these folks  
21 physically. What Mr. Rubenacker decides to do is respond in  
22 kind.

23 So, as seen in Exhibit 14, in the Rotunda CCTV --  
24 the government does the best it can with the images we've  
25 got and the videos we've got. You can see, in the mosh pit

1 of rioters, Mr. Rubenacker lift his arm and swing it down on  
2 the head or helmet of an officer in front of him.

3 The Rotunda CCTV shows it a little better. These  
4 are screenshots that show Mr. Rubenacker in that successive  
5 action of bringing his hand up with the bottle and bringing  
6 it down on one of the officers in front of him.

7 What Mr. Rubenacker may attempt to argue to the  
8 Court is that there is -- it's not clear that he makes  
9 contact with the officer's helmet. The government's  
10 position is the video -- when spliced together with other  
11 open source video and the body-worn camera, we've succeeded  
12 by showing by a preponderance of the evidence that  
13 Mr. Rubenacker makes contact with the helmet.

14 But the bigger point here is, really?  
15 Mr. Rubenacker is in the Rotunda swinging at an officer with  
16 his bottle; he assaulted that officer, and others.

17 We have got body-worn camera -- various angles of  
18 body-worn camera that show the Court Mr. Rubenacker's  
19 behavior as he continues to confront the law enforcement  
20 officers. At one point, after hitting an officer on the  
21 helmet, he lifts his bottle, as the Court is aware, and  
22 throws liquid on multiple officers who are addressing other  
23 rioters by spraying chemical irritant spray. All of those  
24 officers then flinch to the right.

25 The body-worn camera is very clear, showing

1 Mr. Rubenacker lift his bottle and throw that liquid. I  
2 understand the defendant's point is it's water; those  
3 officers don't know that. It's a pandemic, first of all; so  
4 his used water being thrown on these officers is of concern.

5 But, second, it's a riot. Mr. Rubenacker is in  
6 the Rotunda with hundreds of other people, illegally there  
7 and attacking officers; and he decides to prevent some of  
8 those officers from doing their job by throwing liquid on  
9 them. There are countless examples of officers being hit  
10 with liquid that is not water. They are trained to address  
11 those concerns. They flinch, and they stop addressing the  
12 rioters in front of them, which gives the rioters an  
13 opportunity to make more ground; that is of consequence.

14 So Mr. Rubenacker then gets hit with chemical  
15 irritant spray after about 30 seconds to a minute -- after  
16 3:09, when he throws that water on these officers.

17 But, yet, he still doesn't stop. He continues to  
18 then walk out of the east Rotunda doors that he had entered  
19 the second time he breached the Capitol; and he continues to  
20 accost these officers and call them "communists" for doing  
21 their job, as seen in this body-worn camera.

22 (Whereupon, a video, Exhibit 22, was published.)

23 MR. EDWARDS: Mr. Rubenacker is not here on  
24 accident. He knows he is angry at these officers, and he is  
25 calling them "communists." And according to his sentencing

1 memorandum, it's in part because he believes the election  
2 was fraudulent. So the officers are not enforcing this  
3 election; they're the communists for not doing what he  
4 thought they should do.

5 He then goes into the east Rotunda door lobby and  
6 exits the building -- not of his own volition, but  
7 continuously pours water on his face to rinse the chemical  
8 irritant spray that officers were forced to deploy on him  
9 and others, and goes toward the exist; standing there,  
10 continuing to rub his eyes until, finally, a Capitol police  
11 officer puts his arm around him and forces him out of the  
12 Capitol Building at 3:20 p.m., nearly a little over an hour  
13 after the first time he entered at 2:13 p.m.

14 You take those 20 minutes away when he's  
15 traversing illegally on the Capitol grounds to get to the  
16 other entrance, you have got about 45 minutes to an hour of  
17 Mr. Rubenacker being a menace on January 6th; that is the  
18 context of Mr. Rubenacker's conduct, which takes us to after  
19 January 6th. He engages in text communications with other  
20 people, and he calls them -- he says that they betray him  
21 after they publicly message something about his conduct on  
22 January 6th.

23 If I'm understanding correctly, there was some  
24 allegation that a friend or a previous friend had referred  
25 to him as a white supremacist, or something in kind; he

1        didn't like that.

2                But he says on January 6th: I fought for your  
3        constitutional rights. I understand the defendant's point  
4        that that's a phrase that's often used in today's political  
5        parlance. But what is not often done is what Mr. Rubenacker  
6        did on January 6th, by attacking officers and getting within  
7        40 feet of sacred ground where they're supposed to certify  
8        an election; that is fighting, and he did that.

9                He then continues to search for pictures of  
10       rioters and how to encrypt his phone. So, in terms of  
11       accepting responsibility and being remorseful early on, he  
12       certainly engaged in conduct that made it seem like he did  
13       not want to be caught. He texted people that he did not  
14       want to be on messages anymore, that he wanted to turn to  
15       Signal, which is an end-to-end encrypted messaging platform.  
16       And he wanted to encrypt his iPhone, which is the type of  
17       phone he had in the Capitol when he recorded his conduct.  
18       That's not the conduct of somebody after January 6th who is  
19       immediately remorseful.

20               So that's a wrap-up of Mr. Rubenacker's conduct.

21               If I could turn now to the 3553(a) factors for the  
22       Court, the first and foremost is the nature and  
23       circumstances of the offense.

24               It cannot be understated -- overstated.

25               What happened on January 6th is, frankly, a

1 tragedy in this country's history. This is my first  
2 opportunity to address this in a sentencing. And I continue  
3 to look at these videos of Mr. Rubenacker and see nothing in  
4 those actions and in that conduct that is redeeming.

5 That person attacked the core of our democratic  
6 republic. It's January 6th; this has happened for hundreds  
7 of years. The presidential transfer of power is sacred to  
8 this country; it is what we hoist when we say to the rest of  
9 the world that there are ways to conduct ourselves to better  
10 humanity.

11 The transfer of power was unique when George  
12 Washington did it. It continues to be unique in many parts  
13 of the world. And we should continue to strive to preserve  
14 it. Mr. Rubenacker did not.

15 As to the nature and circumstances of the offense,  
16 Mr. Rubenacker's conduct that day warrants serious  
17 punishment.

18 We have named a number of factors that the  
19 government continues to look at at sentencing when we  
20 address the nature and circumstances. I won't go into all  
21 of them because I have addressed some of them today.

22 They include: Did he go inside the Capitol? How  
23 did he get in there? Did he encourage violence or  
24 participate in violence? Did he react to acts of violence  
25 around him, and how so? Did he -- how long was he in the

1 Capitol? Where did he go? What statements did he make?  
2 And what remorse has he shown? All of those aggravating  
3 circumstances apply here.

4 He was in the United States Capitol Building for  
5 almost an hour. He got very close to entering the Senate  
6 Chamber twice before multiple officers had to stop him.

7 He continued to see acts of violence around him  
8 and continued to engage in his own acts of violence by  
9 swinging at officers and throwing liquid on them, by  
10 accosting them and threatening them in the way the Court has  
11 defined that term earlier in this proceeding. And he made  
12 multiple statements that day and afterward that show that he  
13 was not immediately remorseful, that he fought for people's  
14 constitutional rights that day.

15 As for the history and characteristics of the  
16 defendant, the government agrees there is no criminal  
17 history here. But we then turn to the need for the sentence  
18 to reflect the seriousness of his conduct and respect for  
19 the law.

20 It goes without saying, Your Honor, that a serious  
21 punishment is warranted here because of his serious conduct.  
22 He not only assaulted officers like many outside of the  
23 Capitol; but he joined that conduct with additional  
24 aggravating circumstances by breaking into the Capitol twice  
25 and making his way to the Senate Chamber.



1           I want to talk a little bit about adequate  
2     deterrence. There are, as the Court is well aware, two  
3     elements of deterrence; there is general deterrence and  
4     there is specific deterrence.

5           The idea that the defendant should be sentenced to  
6     any sentence of home confinement, and that that would  
7     succeed in providing specific deterrence, is belied by the  
8     other sentences that courts across this district have  
9     applied to similar conduct; and it is belied by the history  
10    of our criminal justice system looking at this kind of  
11    conduct and then allowing someone to go home.

12          I want to talk a little bit more, though, about  
13    general deterrence. This is a circumstance, on January 6th,  
14    where the government must treat this conduct seriously. It  
15    must take Thor's hammer to even the ants. It must treat  
16    this seriously; it must send a message to the world that  
17    this cannot be done, and it cannot be tolerated.

18          The Court plays a significant role in that by  
19    accessing this conduct and determining what kind of  
20    punishment should be doled out for this conduct.

21          Mr. Rubenacker's conduct is serious enough to  
22    warrant taking his liberty away for nearly four years; that  
23    is the government's request. We believe that that would  
24    play a significant role in sending a message to the world  
25    that you cannot do this.

1           The final factor I wanted to discuss before  
2           turning to our restitution request is the unwarranted  
3           sentencing disparities that may exist; and particularly, as  
4           the Court is aware, in this circumstance it's a difficult  
5           analysis to undergo. Never in this country's history has  
6           the Department of Justice or the Court had to deal with so  
7           many data points to assess.

8           The reason a significant sentence of imprisonment  
9           is warranted here is because he, like many others, assaulted  
10          officers; he, like others, entered the Capitol Building.

11          There are other cases, like Scott Fairlamb, who  
12          entered the Capitol Building and assaulted an officer; he  
13          was sentenced to 41 months, and a small amount of time  
14          inside. That is a similar range that Mr. Rubenacker should  
15          be sentenced in, though Mr. Rubenacker's conduct was more  
16          serious because he was in the building twice for nearly an  
17          hour, while Mr. Fairlamb was in the building for a very  
18          small amount of time. And that is significant.

19          It's not arbitrary that the government is focusing  
20          on how much time they spent in the Capitol Building. At  
21          that moment, it is the heart of our democracy; the closer  
22          you are to its core, the closer you are and more culpable  
23          you are for obstructing that proceeding that day in many  
24          ways.

25          But I want to address at least one point the

1       defendant makes in his sentencing memorandum when he  
2       establishes that clearly the government, in its  
3       conversations about how to treat people differently, thinks  
4       that anyone not in the building could not obstruct that  
5       proceeding; it could not be further from the truth with  
6       respect to Mr. Matera [sic].

7               In those conversations, the government made it  
8       very clear that there are many factors that the Court and  
9       that the defense and that the government have to consider in  
10      assessing all of these cases. The government looks at many  
11      factors in determining what kinds of plea offers to provide.  
12      One of those factors is going inside the building.

13             This prosecutor is part of a case where we have  
14      charged someone with 1512(c)(2) who didn't even come into  
15      D.C. So it is not accurate to say that the government has  
16      drawn a line in the sand as to whether or not you are in the  
17      building or you are not; it is simply one factor of many  
18      that this Court should consider, and not arbitrarily so. It  
19      makes perfect sense to assess what they did and how far they  
20      made it to those senators and those representatives.

21             There are other defendants that have been  
22      sentenced to significant --

23             (High-pitched audio feedback.)

24             MR. EDWARDS: I got away with it for a while.

25             There are other defendants who have been sentenced

1 to significant terms of imprisonment including Mr. Wilson  
2 for 51 months; Mr. Devlyn Thompson for 46 months -- those  
3 individuals did not go into the Capitol; they engaged in  
4 significant bouts of violence and witnessed the same on the  
5 lower west terrace tunnel.

6 I suspect the defendant will get up here and tell  
7 you that this was a bottle and this was water, and these  
8 assaults don't compare to those. We don't disagree that  
9 they aren't the same degree of violence to officers; but we  
10 disagree that because of that fact Mr. Rubenacker should be  
11 treated so differently. He also did things these defendants  
12 did not do by making his way to the Senate Chamber, by  
13 chasing Eugene Goodman, by assaulting officers after an hour  
14 of witnessing violence and mayhem inside the Capitol.  
15 That's differently situated than many of these defendants.  
16 And there is no reason to treat him any lesser than these  
17 defendants just because of the gravity of the assault. It's  
18 a difference, but there are many other differences  
19 Mr. Rubenacker has that show he warrants the same kind of  
20 punishment.

21 Finally, Your Honor, I would like to address  
22 restitution briefly. We have requested \$2,000. Unless the  
23 Court has questions on the restitution request, it is based,  
24 as our memo details, on two statutes; the Mandatory Victim  
25 Rights Act [sic] and the Victim and Witness Protection Act.

1 The latter is, of course, discretionary. But the former  
2 makes it mandatory, in the government's view, that at least  
3 to two counts that Mr. Rubenacker has pled guilty to, under  
4 1752(a)(2) and 1752(a)(4), that conduct triggers a mandatory  
5 restitution for the Court to request or impose upon the  
6 defendant.

7 And so, as detailed in our sentencing memorandum,  
8 in terms of enumerator of the damages that many victims have  
9 relayed to the government and denominator of the number of  
10 individuals the government has investigated and arrested, we  
11 have come up with \$2,000 being an appropriate amount for  
12 when someone is convicted of a felony; and that is  
13 Mr. Rubenacker in this situation.

14 So unless the Court has any other questions for  
15 the government, we'd state that, in our briefings and in  
16 today's presentation, the government has put forth a  
17 position that shows the Court that a significant sentence of  
18 imprisonment and supervised release is warranted. This is a  
19 very important sentencing in many ways; and I think the  
20 Court should impose a very significant sentence for  
21 Mr. Rubenacker.

22 Thank you.

23 THE COURT: All right. Thank you.

24 Mr. Matera.

25 MR. MATERA: Thank you very much, Your Honor.

1           Judge, we have no dispute that this was a very  
2           dark day in our country's history. The images of what  
3           happened that day, obviously, are something that we, as a  
4           society, cannot be in favor of. And it's something that,  
5           when Mr. Rubenacker looked back and saw what went on and  
6           what he foolishly involved himself in, had deep regrets --

7           THE COURT: And he foolishly involved himself in  
8           this because he had beliefs that there was a stolen  
9           election; is that right?

10          MR. MATERA: I am going to get to that. Yes, Your  
11          Honor.

12          THE COURT: So does he have those beliefs because  
13          that is important for specific and general deterrence?

14          MR. MATERA: It's not. I am certainly going to  
15          address all of that in the next, literally, 30 seconds; you  
16          stole my thunder a little bit.

17          THE COURT: Okay.

18          MR. MATERA: Judge --

19          THE COURT: There are too many people in the  
20          public sphere who are still talking as if there was a stolen  
21          2020 presidential election.

22          MR. MATERA: I agree.

23          THE COURT: And a lot of the people like  
24          Mr. Rubenacker who attacked the Capitol on January 6th are  
25          susceptible to believing that big lie.

1 MR. MATERA: Yes, I agree.

2 THE COURT: And so the job of this -- the judges  
3 on this court is to ensure both specific and general  
4 deterrence, in the context of these cases, has only, in some  
5 ways, gotten more surprisingly serious.

6 MR. MATERA: Understood. And by no means do we  
7 take any of this lightly. We understand the serious nature  
8 of everything that is involved, of everything that occurred,  
9 and everything that is at stake with these and the remainder  
10 of the cases.

11 THE COURT: Well, I'd like an answer to my  
12 question. Does he still believe the 2020 presidential  
13 election was stolen?

14 MR. MATERA: He does not. He does not.

15 As I said, I am going to absolutely get into that.  
16 But to answer your question, no.

17 THE COURT: Let's get to it.

18 MR. MATERA: Absolutely.

19 So, Judge, 43 minutes is the time that  
20 Mr. Rubenacker was inside the Capitol. Obviously, not an  
21 insignificant period of time, but those 43 minutes are going  
22 to, obviously, forever change this young man's life.

23 Mr. Rubenacker is a very impressionable  
24 26-year-old man. And as Your Honor has just alluded to, for  
25 the better part of several months leading up to January 6th,

1 we have heard, as a society -- whether it's through media,  
2 whether it's through people giving speeches -- we have heard  
3 that the election was stolen. I believe there is even a  
4 book coming out, from what I understand, shortly, by former  
5 President Trump about the "crime of the century," as he  
6 calls it. Mr. Rubenacker got caught up in that; he admits  
7 that.

8 He listened to what was being said not just on  
9 some rumor mill as Your Honor has pointed out. This isn't  
10 something that there is some group on Snapchat or on Twitter  
11 that has these conspiracy theories about the election.  
12 These are words that are coming from our elected officials  
13 at the time all the way up to the very highest elected  
14 official in former President Trump, who then was giving  
15 speech after speech after speech -- including, on  
16 January 6th, about how the election was stolen; something he  
17 still continues to maintain.

18 Mr. Rubenacker, absolutely at the time bought into  
19 what he now knows to be a lie. He bought into the fact  
20 that -- whether it was ballot boxes were stuffed or ballots  
21 weren't counted because they were dragged away. He bought  
22 in, unfortunately.

23 Again, he knows it was wrong now. Now that he has  
24 had a moment to sit back and actually look -- and it's not  
25 just because -- as I am sure the government would probably



1     argue if they had a chance to come back up. It's not  
2     because, well, now he got arrested, that he realizes this;  
3     it's because he sat down -- whether it was with family,  
4     whether it was even me in my office going through all of the  
5     details and he actually focused, and he actually looked at  
6     the entirety of the situation. And he understands that he  
7     was wrong and the belief was wrong; but it doesn't change  
8     the fact that at the time he was listening to the words of  
9     our elected officials.

10           Mr. Rubenacker -- I don't know that anyone will  
11     necessarily dispute, although he showed it in a very odd and  
12     different way. Mr. Rubenacker has a very large love for  
13     this country. And Mr. Rubenacker, when he had this belief  
14     that our election -- one of the most sacred parts of our  
15     democracy, an election -- that an election perhaps was  
16     stolen, he reacted irrationally and horribly wrong; and,  
17     again, he understands that.

18           On January 6th he had believed the rhetoric so  
19     much -- or at least part of -- the one side of the rhetoric,  
20     that he decided to come to Washington; and he decided to go  
21     and listen because he knew President Trump was going to be  
22     speaking.

23           He didn't show up looking for violence, Your  
24     Honor. He didn't show up with a helmet; he didn't show up  
25     with goggles. He didn't show up with body protective gear;

1 he certainly didn't show up with a weapon. He showed up  
2 with -- only with his plastic essential water bottle. He  
3 had no intention on that day to come here and engage in  
4 violence.

5 He had no intention that day or knowledge that the  
6 situation was even going to lead he or anyone else into the  
7 Capitol Building. No way anybody, I think, would have  
8 thought that at the time. But at some point, former  
9 President Trump does tell the crowd to, basically, march  
10 towards the Capitol, and Mr. Rubenacker did. He followed  
11 others in the direction of the Capitol Building, and he  
12 ultimately goes inside when he gets there.

13 He -- in following the crowd, he does follow  
14 Officer Goodman -- or the crowd, before they get to Officer  
15 Goodman, up some staircases -- and the videos show this.  
16 The videos show Mr. Rubenacker on the staircases. He is  
17 not -- yes, he is in the first group -- maybe it's five or  
18 six people, give or take. But it's not that he is on the  
19 staircase at that point, and he is screaming at Officer  
20 Goodman or he's screaming at anyone else, or he is inciting  
21 everyone "move forward."

22 As a matter of fact -- if you pay close attention,  
23 as I am sure Your Honor has, to Mr. Rubenacker's demeanor  
24 and his actions while he is on those staircases, he's kind  
25 of holding his phone and he is looking around; but he makes

1 the foolish mistake to keep going forward. At that point in  
2 time, there is a lot of commotion going on; there is a lot  
3 of people screaming many things.

4 Mr. Rubenacker doesn't know specifically what  
5 every single person is screaming. There is so much  
6 commotion you couldn't possibly hear. We have heard the  
7 video since then and we are not disputing what the  
8 government is claiming was said; we hear it. Mr. Rubenacker  
9 hears it, which is even more -- further enforced his  
10 realization that what his actions consisted of were just  
11 wrong that day.

12 But at no point did he hear those words as he was  
13 on those staircases. He heard things, but -- as you can  
14 imagine with the level of noise and commotion that was going  
15 on, he didn't hear specifically.

16 At no -- there is no denying, also, that when they  
17 get to the wall of officers -- this is during the first  
18 entry, that he does yell at officers. The video is clear;  
19 he doesn't deny that at all. He pled guilty to the entire  
20 indictment as evidence that he doesn't deny that.

21 But yelling at the officers at that point in time  
22 was a further part of Mr. Rubenacker's mistaken beliefs as  
23 to -- at the time as to what went on with the election and  
24 as to what, if anything, these officers were able to do  
25 about it. He thought for sure, if they were there, he was

1       doing the right thing because this is what my President told  
2       me was going on; this is what my President has told me, that  
3       there was a stolen election; this is what my President has  
4       encouraged us to, march towards the Capitol.

5               So being a young man, impressionable as he is, he  
6       had some misguided thoughts that these officers could also  
7       confirm and assist in what former President Trump was  
8       alluding to. Unfortunately, we all know that that belief is  
9       certainly not accurate, certainly misguided; and he knows  
10      that too now.

11             At that point in time, when he is in the area with  
12      the officers, he is there for a total of approximately five  
13      minutes -- not "approximately," he is there for five  
14      minutes.

15             THE COURT: Does he understand that he is being  
16      charged and standing before a federal judge to be sentenced  
17      today not because of his beliefs but because of his  
18      actions --

19             MR. MATERA: He does.

20             THE COURT: -- inspired by those beliefs.

21             MR. MATERA: He does. And that's why I say, he  
22      regrets what those beliefs led him to do that day.

23             THE COURT: When you say that he is an  
24      "impressionable young man" -- continues to be an  
25      impressionable young man, what assurance does that provide

1 the Court that if he hears he is impressed -- being  
2 "impressionable" with other people saying things, that he is  
3 not going to follow through with conduct that is illegal?

4 MR. MATERA: Well, Judge, as part of his release  
5 he was required to undergo continual treatment and therapy,  
6 mental therapy; and he did. He would come back and he would  
7 explain to me how the sessions would go. We would have  
8 conversations about them. We even had a few conversations  
9 with Ms. Moffett [sic], who was the counselor that he was  
10 treating with. Your Honor has seen her letter. And all  
11 indications are that Greg has come a very, very long way  
12 from where he was at the time that even she first  
13 encountered him. I can assure you that he has come a long  
14 way since the time that I first encountered him in  
15 connection with this case.

16 Greg has learned how to cope with his feelings.  
17 He has learned how to cope with any beliefs. He has  
18 refrained from watching all politics because he just doesn't  
19 believe that anything good will come from his particular  
20 viewing, as far as what's being reported and things like  
21 that. Greg has made it clear -- to me, to Ms. Moffett, and  
22 to anyone else -- that he understands what happened that  
23 day, and that what his actions consisted of that day were  
24 wrong; and that -- he has vowed that they will never happen  
25 again.

1           This is a young man that indicated that he so knew  
2           that what happened was wrong and that what he did was wrong  
3           that he pled guilty to the entire indictment. He pled  
4           guilty without the assistance of a plea bargain in place.  
5           He wanted to show this Court that that was his intention; to  
6           take responsibility, to understand that that conduct is not  
7           tolerable, and to promise this Court, in doing so, that this  
8           is not something that Greg would ever be involved in again.

9           Greg has, as Your Honor is aware, never been in  
10          trouble with the law before. Greg is an individual who has  
11          never seen the inside of a court, arguably, until today  
12          because we have been doing the other proceedings virtually  
13          due to the pandemic.

14          This isn't an individual who is out there looking  
15          for trouble, causing trouble. And, in fact, as Your Honor  
16          is aware, in the 15 -- now -- plus months since he was put  
17          on supervised release, there have been absolutely no issues  
18          with pretrial services. I have spoken many, many times  
19          to -- because of the unique circumstances of these cases, he  
20          has had an officer assigned to him in the Eastern District  
21          of New York; I have spoken to that officer on numerous  
22          occasions.

23          There's never been an issue with Greg. There's  
24          never been an issue with him following the rules. There's  
25          never been an issue with him doing what he is told. At no

1 point have they come back to Your Honor or anyone else and  
2 said: We have some concerns that Greg is just not getting  
3 it, or the therapist is saying Greg is not getting it. It's  
4 been quite the opposite.

5 Greg has been getting it. Greg does understand,  
6 and Greg has worked on making himself better. And over  
7 these last 15 months, I truly and honestly believe he has  
8 made himself better. He has come to grips with the  
9 realities of what happened with the 2020 election; he  
10 understands it. He has come to grips with the fact of what  
11 happened on January 6th never should have happened and can  
12 never happen again -- not just with Greg, but to anyone in  
13 this country; he understands all of that.

14 Now, it is true that Greg comes back into the  
15 Capitol a second time after leaving. Now, he left after  
16 five minutes the first time; and it's approximately 24  
17 minutes that he is outside the Capitol. And people saw he  
18 was walking around and doing nothing in particular. And  
19 then people started going in another entrance; and he  
20 foolishly followed them in again. He didn't climb through  
21 any broken windows. He didn't smash any windows himself,  
22 but he did follow them back inside.

23 At that point in time, he takes selfies of himself  
24 smoking marijuana that was given to him by some individual  
25 that he didn't know inside the Rotunda, which -- that, in

1 and of itself, is another incredibly foolish act --

2 THE COURT: Did he smoke not just the marijuana  
3 but also an E-cigarette or vapor?

4 MR. MATERA: His vape -- yes. He did have his  
5 own, that was his.

6 THE COURT: Well, he was taking advantage of this  
7 crowd acting lawlessly by lighting up --

8 MR. MATERA: I understand. I understand.

9 THE COURT: -- a couple of times in the Capitol.

10 MR. MATERA: My point in mentioning that is that  
11 he just clearly wasn't thinking rationally at that time  
12 because no one thinking rationally would take some substance  
13 from another individual in -- whether it's in the Capitol or  
14 anywhere else, for that matter, and start smoking; but Greg  
15 did.

16 Greg decided to take pictures of himself. He  
17 wasn't thinking, at that point in time, about the electoral  
18 certification. He was thinking of where he was and  
19 stupidly, foolishly thought that: I am in the Capitol here,  
20 and I am going to smoke my marijuana -- or whatever  
21 marijuana was given to me [sic] -- which, again, not  
22 excusing the fact that he smoked marijuana.

23 His -- he does have -- the government did make  
24 mention of the fact that it is illegal; and I do understand  
25 that it is illegal currently under the federal law. Greg is



1       somebody who -- in the state of New York, it's not illegal.  
2       Again, I am not excusing his conduct; but I am saying that,  
3       in his mind, he didn't necessarily associate smoking  
4       marijuana with anything improper. Obviously, a mistake.  
5       But, in his mind, because he is legally allowed to smoke in  
6       New York, he mistakenly and foolishly thought that that was  
7       somehow okay; he knows it was not. We have certainly  
8       addressed that many, many times.

9               Now, as the government showed us through videos,  
10       the police then show up -- the D.C. police show up. There  
11       is no doubt they're doing their job. They're trying to --  
12       and Greg understands that now. They are trying to get  
13       people out of the Rotunda, and Greg initially doesn't leave.

14              And at some point in time -- there is no doubt,  
15       from watching the video, that there is some shoving that's  
16       going back -- not with Greg, but with others -- that is  
17       going back and forth between individuals involved in this  
18       crowd and the police officers. And Greg foolishly picks  
19       up -- inexcusably picks up the bottle and does swing it  
20       toward the officer. It's not -- and, again, please don't  
21       think that we're trying to mitigate his actions; we are not.  
22       But we are just trying to show that there is a difference.

23              When you watch this video, this isn't Greg taking  
24       a bottle and just swinging it at somebody. He holds it  
25       above his head and then comes down, almost in like a tapping

1 motion. Not to excuse his conduct, but it's not the same as  
2 somebody who would go up to an officer and punch an officer  
3 in the face. It's not the same -- which we have also had in  
4 one of these January 6th cases. It is not the same as  
5 somebody who would turn around and take a lacrosse stick  
6 taped to a confederate flag and jab an officer in the chest.

7 THE COURT: Shouldn't we just be glad that he only  
8 had a water bottle and not the lacrosse stick?

9 MR. MATERA: Judge, I will submit to you that we  
10 don't know what would have happened if he had something  
11 else. But the very fact that the only thing he had was a  
12 water bottle should be a clear indication that he had no  
13 intention to commit violence that day. He didn't bring  
14 anything. He didn't bring pepper spray. I understand there  
15 are some cases before Your Honor where two defendants had  
16 chemical irritant, and they're spraying it in an officer --  
17 multiple officers' faces. He didn't bring anything like  
18 that with him to the Capitol.

19 So I understand Your Honor's question. But to  
20 suggest that maybe he would have done that -- done something  
21 more significant if he had a bigger weapon; I think it goes  
22 the other way. I think it just shows that that was never  
23 his intention to put himself in that situation despite the  
24 fact that he ultimately did. He didn't intend to come to  
25 the Capitol that day and engage in any violence whatsoever.

1 If he had, he would have had something like any one of these  
2 other defendants. He would not have had just a plastic  
3 essential water bottle on him.

4 So, again, the entire time that he is in the  
5 building is approximately 43 minutes; not an insignificant  
6 amount of time. The government is saying that it was over  
7 an hour; it was over an hour since the time that he had  
8 first entered. It wasn't over an hour actually inside the  
9 building just based on the timelines that have been set  
10 forth.

11 The government has addressed with the Court how  
12 serious -- that it was more serious because of how close  
13 Mr. Rubenacker came to the Senate Chamber; and that  
14 statement, in and of itself, we are not disputing. The  
15 thing is, Mr. Rubenacker is not familiar with the layout of  
16 the United States Capitol.

17 Mr. Rubenacker didn't go in any particular  
18 direction because he is saying: This is where I am going  
19 to get -- I know where the Senate Chamber is, I am going to  
20 get over there. He found himself, yes, in that area that  
21 the government has made reference to, but not because of his  
22 own intentions to say: Let me get over there right now.  
23 It, unfortunately, in following the crowd, did get him over  
24 in that particular location.

25 Now, as we have discussed earlier -- and I won't

1 belabor the point all that much -- but he did plead guilty.  
2 Yes, it was approximately a year after. But for all of the  
3 reasons we have discussed -- and one reason that we left out  
4 and I neglected to bring up as to why it took a year, was  
5 the whole process seemed to go a little bit slower because  
6 we're also dealing with a pandemic at the time; we're in the  
7 midst of it. Things weren't happening as quickly as they  
8 otherwise may have, whether it was with the obtaining or  
9 collection of the videos; the ability to view all of the  
10 videos; the ability for me to even have Greg in my office  
11 many times. We were doing a lot of things over Zoom, which  
12 wasn't always the most conducive.

13           So, yes, it did take 12 months. But as I have  
14 indicated before, it's not 12 months of Greg saying: We are  
15 going to fight this; we are going to fight this. That was  
16 never any conversation that we had. But, again, we did need  
17 to -- the only way to effectively provide proper legal  
18 advice to a client is for me to make sure that the evidence  
19 shows what they're telling me that it shows. We did make  
20 the effort to get those videos.

21           And we understand with just the nature of these  
22 proceedings and the nature of the volume of the video  
23 evidence that was involved -- not to mention, as I stated  
24 earlier, having to find Mr. Rubenacker in crowds of hundreds  
25 or thousands of people -- so it did take time. So, again, I

1 just want to stress that point.

2 THE COURT: Yes. There were a lot of red MAGA  
3 hats.

4 MR. MATERA: Yes, there were. Yes, there were.

5 And by the way, a red MAGA hat that Mr. Rubenacker  
6 did not show up to the Capitol with that day. It was handed  
7 to him while he was in the crowd. Yes, he put it on; no one  
8 forced him to put it on.

9 But, again, it just goes to show his thought  
10 process at that point in time in coming was what he thought  
11 was to peacefully protest what he was led to believe was a  
12 fraudulent election -- something that he came to the  
13 conclusion is no longer -- that is no longer his belief. He  
14 came to that conclusion very early on after he and I first  
15 met and actually sat down and looked at everything.

16 Now, the government also talks about  
17 Mr. Rubenacker's conduct after the events. They have  
18 suggested to the Court that his conduct in what he was  
19 saying to other people: I fought for your rights, and  
20 things like that. Again -- and the government is exactly  
21 right; that's exactly what I am going to say to Your Honor.

22 To say, "I fought for your rights" to somebody is  
23 not meaning that I fought physically for your rights any  
24 more than it is that I'm fighting for his rights right now;  
25 I am not doing anything physical. It's a term of art that

1       was used, and Mr. Rubenacker --

2               THE COURT: I don't think that was the  
3 government's point, that he was admitting some physical  
4 violence. I think the government's point was: Even after  
5 seeing what had happened on January 6th, and the shock in  
6 this nation about what was happening, and what happened on  
7 January 6th for weeks after, he was still defending his  
8 conduct on January 6th.

9               MR. MATERA: Well, I don't necessarily think --  
10 agree with that particular position. But I think what Greg  
11 was doing at that point in time, when he came to the  
12 conclusion very early on -- and even before the time that  
13 the FBI approached his home and placed him under arrest.  
14 From what I have been told from members of his family when  
15 they saw everything that was going on -- and they spoke to  
16 Greg about it, like, what was going on there? He  
17 immediately even had conversations with them about: Things  
18 got out of hand; I can't believe what happened over there.

19               So the fact that Greg was trying to disassociate  
20 himself with his involvement that day is not because he was  
21 trying to hide evidence or he was trying to hide any facts  
22 or that he was there, it was because Greg realized what he  
23 did and he didn't want himself associated with anything that  
24 he did so that friends, who ultimately were, you know, using  
25 some terms that -- or former friends at this point, using

1       some terms in response to what they were seeing, what they  
2       were hearing -- this is why Greg turned around and started  
3       to remove some of the videos, because he realized they were  
4       wrong.

5               When someone realizes that what they did was  
6       wrong, trying to do whatever little part they can to remedy  
7       the situation is not something that should be frowned upon,  
8       it's something that should be appreciated; the fact that he  
9       realized that what he did was wrong. He realized that he  
10      didn't want himself involved in anything like that. It was  
11      never done to hide evidence or to deceive anyone else into  
12      thinking that he wasn't there.

13             Now, I know you have read our sentencing  
14      memorandum; and there are a few things that I would like to  
15      highlight for Your Honor. This situation that Greg got  
16      himself into was something that's unfortunate, yes, and  
17      something that started -- as far as Greg's mental state of  
18      mind, started from a very early time in his life.

19             Greg is one of 16 children. At times, that was  
20      very difficult for Greg growing up. Greg often found  
21      himself as one -- maybe not the only one with 16 children,  
22      but one that was not the focus all the time. He spent a lot  
23      of alone time; he felt left out. And Greg turned around and  
24      turned to friends that he made.

25             Friends became -- obviously, his parents, but --

1 he had a better relationship with his parents than he did  
2 with all of his brothers and sisters, but his friends became  
3 his family. At an early age, while in high school -- as, I  
4 pointed out in my memo, Greg witnessed several of his high  
5 school friends, his high school family, die in a horrible  
6 car accident; and he also watched one of his friends get  
7 arrested and ultimately convicted for causing the deaths of  
8 those individuals.

9 As a result, Greg's -- part of his sense of family  
10 was stolen from him at that point in time, and it was very  
11 hard for Greg. He immediately went into therapy. He was --  
12 at that time, he was diagnosed with PTSD as well as anxiety  
13 disorders; and he was treating with a doctor -- a doctor,  
14 too, for quite some time before that.

15 Greg has indicated to me that the therapy that he  
16 has gotten through the Court-mandated therapy has been an  
17 even greater help to him and something that he plans on  
18 continuing at some point when the situation will allow him  
19 to do so.

20 Mr. Rubenacker is also an aspiring musician --  
21 musical artist, I should say. He has, because of his  
22 actions, suffered greatly in his career that he was working  
23 towards; and perhaps that's rightfully so. I understand  
24 that. But because of the situation that he finds himself  
25 in, he certainly has lost a lot of opportunities.



1           He has worked very hard -- and we appreciate and  
2     thank Your Honor because you did, during the 15 months, give  
3     him the ability to continue to go to -- to extend the  
4     geographical territory of where he was allowed to travel to  
5     just so he could start to rebuild that career. And I am  
6     happy to say that he has made tremendous strides in that.

7           Any very long or lengthy prison sentence would  
8     totally derail the progress that he has made again and would  
9     totally put Greg in a situation where -- you know, the music  
10    industry, as Your Honor may or may not be aware, is fickle.  
11    And it doesn't tend to lend itself to -- I don't want to say  
12    "older" because I am certainly way older than Greg, but it's  
13    not something that is easy to get into at a later time in  
14    life; it's more of a young person's -- in today's day and  
15    age, it's more of a young person's profession than it is  
16    that we can see just from looking at any of the local -- the  
17    current pop charts, and things like that. Any lengthy jail  
18    sentence would result in Greg losing even further  
19    opportunities. We very much want him to be able to be a  
20    productive member of society and to continue to give back;  
21    and that is one of the ways -- continuing his career -- that  
22    he would be able to do that.

23           Now, the government, in all of the January 6th  
24    cases that I am aware of, has asked the Court to consider a  
25    bunch of -- many different factors, including the

1       destruction of property on January 6th.

2               Obviously, Greg did not destroy any property; he  
3       is not accused of destroying any property --

4               THE COURT: I am well aware of his offense  
5       conduct. You don't have to go through what he did or he  
6       didn't because it is now 1:30 --

7               MR. MATERA: I understand. I actually was going  
8       to ask you that before I started. Did you -- I don't know  
9       if the Court --

10              THE COURT: We're going to continue until the end.

11              MR. MATERA: Okay. So, Judge, we have no doubt  
12       and we don't dispute the fact that the ultimate sentence  
13       that Your Honor is going to hand down needs to reflect the  
14       serious nature of the offense; we do get that. And we are  
15       not for a minute trying to minimize the nature of the  
16       offense. But again --

17              THE COURT: I know you are not trying to minimize.  
18       But you did submit letters, including one letter who  
19       compared the January 6th rioters to those who attended  
20       Woodstock --

21              MR. MATERA: Yes.

22              THE COURT: -- and expressed some criticism of the  
23       person who turned Greg in who obviously did not know him  
24       well.

25              So how am I supposed to reconcile -- your words --

1       that you don't want to minimize; and then I also read the  
2       letter saying that what happened on January 6th was like a  
3       1969 music festival?

4               MR. MATERA: I understand.

5               THE COURT: I think when it goes to the smoke --  
6       the pot smoking perhaps; but I think the comparison falls  
7       apart after that.

8               MR. MATERA: Yes. But the words of this  
9       particular individual are not necessarily -- they don't  
10      share Greg's beliefs and they don't share Greg's sentiments  
11      as far as what Greg believes.

12              Certainly, Greg is not anyone who knows much about  
13      Woodstock, unless he has read something about it. But it's  
14      not somebody who shares -- it's somebody who knows Greg and  
15      explained, also, who they think Greg actually is. Did they  
16      make an extra reference, they did; but we don't necessarily  
17      agree. We don't agree with their assessment and their  
18      comparisons of what happened on January 6th to Woodstock by  
19      any means whatsoever, Your Honor. Like I said, the balance  
20      of the letter which was explaining who Greg is is what we  
21      were trying to convey to the Court.

22              THE COURT: All right. Mr. Matera, I do know that  
23      your recommendation is 12 months of home confinement.

24              Is there anything else you want to add?

25              MR. MATERA: Yes. Judge, again, my recommendation

1 of the 12 months of home confinement had more to do with  
2 what we hoped would have been a successful challenge to our  
3 objections. Understanding that the --

4 THE COURT: Even had your objections been  
5 successful, he still would have faced substantial jail  
6 time --

7 MR. MATERA: He would have faced 24 to --

8 THE COURT: -- 30 months.

9 MR. MATERA: -- 30 months. Yes, I understand.

10 Judge, it's our position that any kind of lengthy  
11 jail sentence is going to significantly impact not only  
12 Mr. Rubenacker's potential for his career, his ability to  
13 care for his parents -- which he currently does now, who are  
14 both in their 80s; his mother, in particular, who is not  
15 physically well. She suffers -- as you saw in her own  
16 letter, suffers from some ailments which Mr. Rubenacker was  
17 able, at the time, to help her out around the house, and  
18 things like that; and care for his father, which his mother  
19 is not able to do for the most part.

20 THE COURT: But as you pointed out, this is a very  
21 big family.

22 MR. MATERA: It is, but they don't all live there  
23 anymore, that's the problem. A lot of them are dispersed  
24 all over the country. One of them is in military service;  
25 he is deployed, he is not around. Unfortunately, there is

1       only a handful of these individuals who are even around.

2       And I can assure you that those individuals do not take the  
3       same care of the parents that Mr. Rubenacker does for  
4       whatever reason.

5               THE COURT:   Well, they might have to step up.

6               MR. MATERA:   I'm sorry?

7               THE COURT:   I said, "They might have to step up."

8               MR. MATERA:   Understood.

9               So in light of all of these factors, Judge, I am  
10       going to ask you to consider a sentence of less than the 41-  
11       to 51-month guideline range, a sentence that is more in line  
12       with Mr. Rubenacker's actions that day, and ask that you  
13       take mercy on him and give him a sentence closer to  
14       somewhere between 18 and 24 months.

15              THE COURT:   Thank you, Mr. Matera.

16              Mr. Rubenacker, this is your opportunity to speak  
17       to me directly if you wish.   I have read your letter.

18              THE DEFENDANT:   Come forward?

19              THE COURT:   Yes.   You can step forward, but keep  
20       your mask on, please.

21              THE DEFENDANT:   How are you doing, Your Honor?

22              Well, as my letter says, I had the pleasure of  
23       meeting you under very unfortunate circumstances.   And I --

24              THE COURT:   More unfortunate for you than for me.

25              THE DEFENDANT:   Yeah.   I mean, for the last year I

1 have had an ankle monitor on me for over 400 days. I have  
2 had a curfew to 12 -- it was nine o'clock, then it was  
3 switched to 12 when you granted me the city [sic] so I could  
4 start working on my work more.

5 I work with Grammy-nominated producers; I work  
6 with Buddha and Grams [sic]. I work with Craig Dairy, who  
7 is known as Lady Gaga's and Katy Perry's vocal coach. I  
8 have been making music for eight years. And everything that  
9 I have been doing in the last eight years has finally  
10 started coming to fruition. And, you know, in the last  
11 year, because of my actions -- obviously, a lot of things  
12 have fallen apart for me. I was recently played on the  
13 radio in Europe on F1 radio. My coach tried to get me to go  
14 on a 20-day tour this summer but I, obviously, could not go.

15 I also want to express my serious condolences to  
16 the people that were hurt on January 6th; and I do want to  
17 say that I am really sorry for my actions. And through  
18 therapy and, you know, through a lot of support in the last  
19 12 months, I feel like my mental health has probably been  
20 the best it's ever been.

21 I did suffer a lot when I lost my friends. I do  
22 think this therapist has probably been the only therapist to  
23 really help me. I do think that losing her is going to  
24 impact my mental health because I have been through several  
25 therapists before in my life, and none of them helped me.

1 And I have been through so much in my life with my friends  
2 dying, seeing them -- I saw my friend take his last breath;  
3 I saw my other friend's neck broken.

4 So I have been through a lot in my life. And I  
5 definitely have been just trying -- you can even look this  
6 up on SoundCloud; but my dream in life was to always just  
7 chill [sic] people and spread good vibes to people. You can  
8 look it up on SoundCloud. When I -- people call me "DJ"  
9 because I used to DJ a lot. I used to make my -- a little  
10 podcast, and it was called Good Vibes Sessions with Rubicx.  
11 So that was always my goal, dream, and aspiration in life  
12 because of all of the pain and suffering that I have been  
13 through in my life -- that I just wanted to dedicate my life  
14 to try and help other people because people feel alone;  
15 people are depressed; people have anxiety; people have  
16 mental health problems. And I always wanted to just make  
17 sure that people didn't like -- people knew they weren't  
18 alone.

19 And, again, I am just -- I wish I just never went  
20 to January 6th. I wish I never believed the lies. And all  
21 I can tell you is that I am definitely becoming a better  
22 person for myself and for this country, and that I hope  
23 that I --

24 THE COURT: Please put your mask above your  
25 nose --

1           THE DEFENDANT:  -- and that I can hope and show  
2     you that I am the person that I have been telling you about  
3     as I am speaking here, because the actions on January 6th  
4     don't match who I am; and I am truly sorry for that.

5           And that day is a very dark day for democracy, and  
6     it should never happen again.  And I just want to say sorry  
7     to you -- to you guys for even having to go through all of  
8     these cases.  And I also want to say sorry to the United  
9     States of America because people look at this as a very dark  
10    day; and I am very sad and upset that I was even part of  
11    this day.

12          THE COURT:  All right.  Thank you, Mr. Rubenacker.

13          Mr. Matera -- you can stay right where you are,  
14    Mr. Rubenacker.  I am going to explain the sentence I am  
15    going to impose, and then impose sentence.

16          Mr. Matera, do you want to stand with your client?

17          So after considering the sentencing memoranda,  
18    multiple memoranda submitted by each side, the presentence  
19    investigation report, the sentencing recommendation from the  
20    probation office, the recommendations on sentencing from  
21    each of the parties, I must now consider the relevant  
22    factors set out by Congress in 18 U.S.C. Section 3553(a) and  
23    ensure I impose a sentence that is sufficient but not  
24    greater than necessary to comply with the purposes of  
25    sentencing.



1           The purposes of sentencing include: The need for  
2           the sentence imposed to reflect the seriousness of the  
3           offense; promote respect for the law; provide just  
4           punishment for the offense; deter criminal conduct; protect  
5           the public from future crimes by you, Mr. Rubenacker; and  
6           promote rehabilitation.

7           So having already considered how the guidelines  
8           apply in this case, I must -- pursuant to 18 U.S.C. Section  
9           3553 -- also consider: The nature and circumstances of the  
10          offense, your history and characteristics, the types of  
11          sentences available, the need to avoid unwarranted sentence  
12          disparities among defendants with similar records found  
13          guilty of similar conduct, and the need to provide  
14          restitution to any victims of the offense. And I will begin  
15          with the restitution amount owed by Mr. Rubenacker.

16           UNIDENTIFIED SPEAKER: Can I just --

17           THE COURT: There is no plea agreement [sic]  
18          between the parties in the case, and the government asked  
19          for the same amount in restitution as it asked for in  
20          previous felony pleas, \$2,000.

21           Restitution is mandatory under the Mandatory  
22          Victim Restitution Act, the MVRA, codified at 18 U.S.C.  
23          Section 3663(a) for defendant's convictions on Count 4:  
24          Entering and remaining in a restricted building or grounds,  
25          in violation of 18 U.S.C. Section 1752(a)(1); and on Count 6

1 for engaging in physical violence in a restricted building  
2 or grounds, in violation of 18 U.S.C. Section 1752(a) (4).

3 The restitution is discretionary, under the Victim  
4 and Witness Protection Act of 1982, the VWPA, for four other  
5 of the defendant's convictions on Count 1, for civil  
6 disorder; Count 2, obstruction of an official proceeding in  
7 violation of 18 U.S.C. Section 1512(c) (2); Count 3,  
8 assaulting, resisting certain officers in violation of  
9 Section 111(a) (1); and Count 5, disorderly and disruptive  
10 conduct in a restricted building in violation of 18 U.S.C.  
11 Section 1752(a) (2).

12 And the government argues that restitution is  
13 appropriate under the VWPA because of defendant's conduct in  
14 conjunction with that of many other rioters directly and  
15 proximately resulting in damage to the Capitol Building and  
16 grounds and losses suffered by law enforcement officers  
17 deployed to protect members of Congress, their staff, and  
18 other Capitol employees; and the Court agrees.

19 Where, as here, the case involves the related  
20 criminal conduct of multiple defendants, the procedures for  
21 awarding restitution under both the MVPA and the VWPA allow  
22 the Court discretion to hold the defendants jointly and  
23 severally liable for the full amount of restitution or  
24 apportion restitution and hold the defendant responsible  
25 only for his own individual contribution to the victim's

1       loss.

2               And, here, the amount of \$2,000 is an approximate  
3       estimate of the losses for which he is responsible. And I  
4       do find that that is the standard amount that so far has  
5       been -- for which defendants from January 6th facing and  
6       convicted of felony charges are being required to pay. And  
7       so I will impose that amount of \$2,000 as restitution, and  
8       find that it is -- based on the record before me -- the best  
9       available estimate of damages for which this defendant  
10      should be held responsible.

11              Now regarding the nature and circumstances of the  
12      offense, he has pled guilty to all ten charges against him.  
13      His conduct did help facilitate a riot that overwhelmed law  
14      enforcement and succeeded, at least for a period of time, in  
15      disrupting the proceedings of Congress to certify the 2020  
16      presidential election.

17              As to this defendant -- and I think the government  
18      said that there are many, many data points associated with  
19      each defendant's specific offense conduct that goes into  
20      fashioning an appropriate sentence for that defendant. And,  
21      in this case, the things that stand out about  
22      Mr. Rubenacker's specific offense conduct in this case is  
23      that he was part of this vanguard of people storming the  
24      Capitol Building in entering the Senate wing doors within 60  
25      seconds of the initial breach of the building, which

1 occurred at about 2:13 p.m.

2 He entered less than one minute later through the  
3 set of doors that had been busted open by force by the  
4 rioters. Once inside, he was then part of this mob that  
5 approached Capitol Police Officer Eugene Goodman, greatly  
6 outnumbering him; yelling at him; screaming obscenities at  
7 him. According to Officer Goodman's victim impact  
8 statement, it left him with no idea what to believe what  
9 their intentions were, and caused him to retreat to the top  
10 of the stairs until he finally saw the backup of his fellow  
11 police officers in the Ohio Clock Corridor.

12 This defendant was with the crowd that simply  
13 ignored the repeated instructions to back up and to leave.  
14 And rather than backing up, this defendant followed him all  
15 the way up the steps.

16 I am not going to repeat things that we have  
17 already spent over an hour looking at, but I want to  
18 emphasize that chasing Officer Goodman up the stairs was  
19 antagonistic conduct; it was threatening conduct. It was  
20 scary conduct for Officer Goodman, and it was -- would, on  
21 its own, warrant significant punishment.

22 The defendant filmed himself walking through the  
23 hallways of the Capitol saying things like: "Holy shit!"  
24 "This is history!" "We took the Capitol!" Clearly  
25 exhilarated by the fact that all these people in this crowd

1       were able to overwhelm the police.

2               And although he did exit the Capitol after this  
3       first illegal entry, about 20 minutes later -- despite  
4       having had a face-off encounter with all the line of police  
5       officers outside the Ohio Clock Corridor who were telling  
6       him to leave the building, he decided to do a second illegal  
7       reentry into the Capitol, at approximately 2:42, through the  
8       Rotunda doors.

9               Upon entering the Rotunda, he was apparently -- in  
10      the words of his counsel, so impressed with the temple of  
11      democracy, he decided to start smoking marijuana and puffing  
12      on a vapor. He brazenly filmed himself doing that, and  
13      posted it on social media with the caption, "Smoke out the  
14      Capitol, baby." "Smells like freedom in here." To me, this  
15      strikes me as a person feeling so bloody entitled with his  
16      right to be there inside the Capitol Building and was so  
17      exhilarated and excited about his ability to overwhelm the  
18      police, that he celebrated by smoking marijuana with a group  
19      of other people who were also smoking marijuana inside the  
20      Rotunda.

21              The defendant's reaction to being told by police  
22      officers to leave was, again, to harass and taunt the  
23      officers. In filming himself yelling: "We pay for you to  
24      serve us." "You serve this country." "Are you even proud  
25      of yourself?" "Are you guys even proud of yourselves?"

1 "Who are you guys serving?" He later accused the police  
2 officers of engaging in a communist act. "This is a  
3 communist act by you guys."

4 But not content with just the verbal harassment of  
5 police officers in the Rotunda trying to cabin the group of  
6 rioters -- at least at this one section of the building,  
7 rather than having them maraud through the rest of the  
8 building, although some of them already had -- he boldly  
9 stepped forward to a line of police officers and was --  
10 leapt up and swung a plastic water bottle at law  
11 enforcement, which was the only weapon he had in his hands.  
12 And it appeared to me as if he made contact with the helmet  
13 of a police officer.

14 He then, a minute later, opened the bottle and  
15 sprayed the liquid from his bottle across multiple law  
16 enforcement officers who were trying to engage in the crowd  
17 to clear the Rotunda. He attempts to minimize his conduct  
18 by saying it was just water, it was just a water bottle.  
19 But anyone could see that the officers actually flinched.  
20 They had reason to fear being sprayed by an unknown  
21 substance.

22 It took being pepper sprayed to the face before  
23 this defendant decided finally to exit the Capitol more than  
24 an hour after he initially went in.

25 All the while he was yelling at the officers,

1 "This is a communist act right here." "I hope you guys are  
2 proud of that." "This is a communist act by you guys."

3 The nature and circumstances of this offense, the  
4 need for this sentence to reflect the seriousness of the  
5 offense and promote respect for the law favors a custodial  
6 sentence.

7 Regarding his history and characteristics, he has  
8 no prior criminal history. I also appreciate that he was  
9 strongly affected by the tragic death of his friends in a  
10 car accident, but that accident occurred eight years ago; it  
11 cannot serve as an excuse for this defendant to so brazenly  
12 break the law twice by illegally entering the Capitol  
13 Building.

14 THE DEFENDANT: I still suffer from PTSD.

15 THE COURT: It appears, from the letters submitted  
16 by the defendant's family and his mental health counselor,  
17 that he has been very helpful in caring for his parents, but  
18 he does have a number of other siblings who can help step in  
19 while the defendant is held accountable for his actions on  
20 January 6th.

21 The need for the sentence imposed to deter  
22 criminal behavior and protect the public from further crimes  
23 by this defendant are critical considerations for every  
24 sentencing judge, and the seriousness of the criminal  
25 conduct on January 6th highlights the need for deterrence in

1 the form of a sufficient sentence to deter the defendant and  
2 others from engaging in this kind of violent breach of our  
3 democracy in the future.

4 In the days after he breached the Capitol,  
5 Defendant's actions and statements suggest anything but  
6 acceptance or appreciation of the wrongdoing. He searched  
7 the internet for FBI pictures of rioters and methods to  
8 encrypt his iPhone, suggesting he was attempting to conceal  
9 evidence of his criminal actions.

10 He told others to message him on the encrypted  
11 messaging app Signal, rather than iMessage, explaining, "I  
12 don't trust anyone right now," and texting one individual,  
13 "Y'all have video of me in the capital?" "Fuck u." And  
14 another, "Playing with my freedom I guess is funny to you  
15 and I did zero violence."

16 Even more than that, his statements to others in  
17 the days after the Capitol attack reflect his pride in his  
18 actions that day. He bragged he had been let into the  
19 Capitol by police despite knowing that was not the case. In  
20 fact, he was told by the police to leave repeatedly.

21 And when one individual texted him on  
22 January 27th, 2021, weeks after January 6th, expressing  
23 dismay about his actions on January 6th, he responded: I'm  
24 trying to understand what I do [sic] that offended you so  
25 much and what violence did I do? And "My beliefs are



1 constitutional beliefs." He also boasted to another person  
2 he fought for their constitutional rights.

3 What the defendant did on January 6th was anything  
4 but fighting for constitutional rights.

5 I do appreciate the remorse he's expressed in his  
6 letter and in his statement today. But, at the same time, a  
7 sentence of incarceration is appropriate to deter this  
8 specific defendant from future unlawful activity and from  
9 others who may have an uncritical -- be an uncritical  
10 believer of news or theories -- no matter how incredible, no  
11 matter how unproven -- from engaging in actions that are  
12 illegal based on those uncritical and false beliefs.

13 Dissatisfaction with our country's legitimate and  
14 peaceful avenues for expression of discontent don't give  
15 citizens license to disobey the law and overthrow  
16 democratically elected governments.

17 It bears repeating, again and again, at every one  
18 of these sentencings that every legitimate and reputable  
19 review has found the 2020 presidential election to be fair,  
20 with the results unassailable.

21 This defendant is a grown-up. He was a grown-up  
22 on January 6th, 2021; he should have known better.

23 When determining what sentence to impose, the  
24 importance of deterring future malcontents from disrupting  
25 the peaceful transition of power, which happens every four

1 years in this country, after an election weighs very heavily  
2 in this Court's consideration.

3 There are consequences to going along with the  
4 crowd when the crowd is engaging in clear, obvious criminal  
5 activity, and consideration of this factor favors imposition  
6 of a period of incarceration to promote respect for the law,  
7 deter this defendant and others from additional criminal  
8 activity.

9 Regarding the types of sentences available, a  
10 sentence of probation is not appropriate since his guideline  
11 range falls in Zone D of the Sentencing Table. And that  
12 is -- these are advisory guidelines, but I do believe that  
13 the guidelines recommendations regarding a period of  
14 incarceration is amply reasonable in this case.

15 I do concur with the government and the  
16 recommendation of the probation office that a term of  
17 incarceration is well warranted here. And let me sum up the  
18 ten aspects of the specific conduct here that, to my mind,  
19 warrant a period of incarceration.

20 First, he was among the very first rioters to  
21 enter the Capitol. And dramatic videos show the crowd  
22 breaking and smashing the windows surrounding the Senate  
23 wing door, pushing inside the building. Loud alarms are  
24 blaring; there is glass broken on the floor. It makes clear  
25 that the rioters' presence was anything but invited by the

1 police, as the defendant sort of mentioned to one of the  
2 people he communicated with. He was right there within 60  
3 seconds, among the first of the 50 people to enter the  
4 Capitol through the Senate wing door.

5 Second, upon entering the Capitol, rather than  
6 wandering briefly through a public hall and out -- as a  
7 number of defendants before me have done -- he joined a huge  
8 crowd who targeted a law enforcement officer, Eugene  
9 Goodman, followed him up the floor -- up the stairwell to  
10 the second floor, with a bunch of people in the mob asking:  
11 Where are they counting the votes? All the while ignoring  
12 Officer Goodman's instructions to back up.

13 Third, once upstairs, he followed Officer Goodman  
14 into the Ohio Clock Corridor, where there were other  
15 uniformed officers positioned. He joined the crowd in  
16 taunting and harassing those law enforcement officers,  
17 seeming to delight in the finger pointing and the jeers.

18 He did exit the Capitol through another door about  
19 ten minutes later and -- but instead of staying outside,  
20 appreciating he wasn't supposed to be inside, he just let  
21 his bad decision snowball.

22 So a fourth reason the defendant's conduct  
23 warrants incarceration is his incredibly foolish but, also,  
24 dangerous decision to re-enter illegally into the Capitol  
25 Building a second time. To get inside the second time, this

1       defendant -- indistinguishable from a sea of red MAGA  
2       hats -- helped the crowd violently push into the doors near  
3       the Rotunda until those had been breached, and they were  
4       able to stream inside.

5               Fifth, once back inside the Capitol, amidst the  
6       beauty of the Rotunda, he lit up a joint and began to smoke  
7       as if this were a party. He filmed himself for social  
8       media, as if the use of illegal drugs while illegally  
9       present inside the Capitol on one of the scariest days in  
10      our history was something to celebrate and make him look  
11      cool. He was not cool.

12             Sixth -- he was also not a patriot.

13             Sixth, as the Rotunda began to fill with more and  
14      more rioters, law enforcement arrived to try and get the  
15      scene under control. He, again, began to harass the  
16      officers there trying to do their job.

17             His words to the officers displayed a misplaced  
18      sense of entitlement entirely at odds with his illegal  
19      actions and those of hundreds of the other rioters that day.  
20      He is the one who asked the officers who were serving and  
21      questioned their patriotism, inexplicably accusing them of  
22      being communists until he was sprayed with tear gas.

23             Seventh, as the tension s arose in the Rotunda,  
24      the surveillance footage shows -- or CCTV footage, plus the  
25      body-worn camera footage -- shows the defendant coming

1 closer and closer to the frontline between the protesters  
2 and the police, like a moth to a flame, trying to get to the  
3 front of the group. He used his body as a battering ram to  
4 push protesters toward the police, providing clear physical  
5 support to the rioters in front of him and egging them on in  
6 their physical altercation with the police.

7 Eighth, as he drew near to the police, he reached  
8 out his water bottle, over the protesters in front of him,  
9 to reach far enough in front of him to hit a police officer  
10 on the head with it.

11 Ninth, as the police dispensed tear gas in an  
12 attempt to push the crowd back, he attempted to circumvent  
13 their efforts and resist their efforts to get people out of  
14 the Rotunda and the Capitol Building. He opened the lid of  
15 his water bottle, and he sprayed liquid across the multiple  
16 officers who were seen to flinch.

17 Finally, although he claims to now regret his  
18 actions that day, his messages to friends in the weeks after  
19 the attack show a defensiveness and an arrogance about his  
20 role in the riot, even as he also sought to shield his role  
21 by switching to an end-to-end encrypted messaging platform  
22 that he thought Snowden uses, by searching online for ways  
23 to encrypt his iPhone, by aggressively defending his actions  
24 on January 6th to others, and expressing anger towards  
25 others for posting publicly online information about his own

1 actions at the Capitol on January 6th.

2           Officer Goodman's victim impact letter makes  
3 eloquently clear how the effects of that day continue to  
4 linger on those working inside the Capitol Building. He  
5 says: It's been hard on the crew workers in the building,  
6 with some having to seek medical treatment and continuing  
7 fears about what happened that day.

8           Moving on to the next factor, the need to avoid  
9 unwarranted sentencing disparity, the government points to  
10 cases which it says contain a similar balance of aggravating  
11 and mitigating factors as the defendant here, and also has  
12 provided a very helpful chart of the sentences thus far  
13 imposed on January 6th cases.

14           The defendant debates whether or not those  
15 individuals had more egregious conduct. And in the Court's  
16 view, I just look at *U.S. v Fairlamb*, where that  
17 defendant -- just as this one -- pleaded to obstruction of  
18 justice under 1512(c)(2) and, also, assaulting, resisting,  
19 or impeding officers in violation of 18 U.S.C. 111(a)(1).  
20 And that court -- in that, the court imposed a sentence of  
21 41 months on that defendant. Also, with respect to Duke  
22 Wilson -- where the defendant was charged and convicted of  
23 the same two charges; he was sentenced to a sentence of 51  
24 months after picking up a pipe and striking indiscriminately  
25 at officers. And in *Thompson*, where the defendant also

1       pleaded to assaulting, resisting, or impeding officers in  
2       violation of 18 U.S.C. Section 111(a)(1) only -- not the  
3       1512(c) obstruction charge -- that defendant who had struck  
4       a police officer in the arm, as well as verbally harassed  
5       law enforcement -- he was given 46 months' incarceration.

6               To my mind, this defendant's conduct differs in  
7       some ways from those defendants, but is more egregious in  
8       other ways -- largely based on the ten factors I have  
9       already listed, and the fact that he went into the building  
10      twice, and the other factors I have already talked about.

11              So based on my consideration of these and other  
12      factors, I will now state the sentence to be imposed.

13              Pursuant to the Sentencing Reform Act of 1984 and  
14      in consideration of the provisions of 18 U.S.C. Section  
15      3553, and the advisory sentencing guidelines, it is the  
16      judgment of the Court that you, Greg Rubenacker, are hereby  
17      committed to the custody of the Bureau of Prisons for a term  
18      of 41 months -- which is 3 years, 5 months -- on each of  
19      Counts 1, 2, and 3; a term of 12 months on each of Counts 4,  
20      5, and 6; and a term of 6 months on each of Counts 7, 8, 9,  
21      and 10; with all such terms to run concurrently.

22              You are further sentenced to serve a 36-month,  
23      3-year, term of supervised release as to each of Counts 1,  
24      2, and 3; and a term of 12 months, 1 year, on each of  
25      Counts 4, 5, and 6; with all such terms to run concurrently.

1           In addition, you are ordered to pay a special  
2           assessment of \$100 for each of Counts 1, 2, and 3; \$25 for  
3           each of Counts 4, 5, and 6; and \$10 for each of Counts 7, 8,  
4           9, and 10; for a total of \$415, in accordance with 18 U.S.C.  
5           Section 3013.

6           You are also ordered to make restitution to the  
7           Architect of the Capitol in the amount of \$2,000.  
8           Restitution payments shall be made to: The Clerk of the  
9           Court for the U.S. District Court, District of Columbia, for  
10          disbursement to the following victim: Architect of the  
11          Capitol, in the amount of \$2,000; Office of the Chief  
12          Financial Officer, attention Kathy Sherrill, CPA, Ford  
13          Office Building, Room H2-205B, Washington, D.C. 20515.

14          While on supervision, you shall abide by the  
15          following mandatory conditions as well as the standard  
16          conditions of supervision which are imposed to establish  
17          basic expectations for your conduct while on supervision.

18          The mandatory conditions include: One, you must  
19          not commit another federal, state, or local crime;

20          Two, you must not unlawfully possess a controlled  
21          substance;

22          Three, you must refrain from any unlawful use of a  
23          controlled substance, which includes marijuana. You must  
24          submit to one drug test within 15 days of placement on  
25          supervision, and at least two periodic drug tests thereafter



1 as determined by the Court;

2 Four, you must cooperate in the collection of DNA,  
3 as directed by the probation officer;

4 Five, you must make restitution in accordance with  
5 18 U.S.C. Section 3663 and 3663(a).

6 You shall also comply with the following special  
7 conditions:

8 You must submit to substance abuse testing to  
9 determine if you have used a prohibited substance. You must  
10 not attempt to obstruct or tamper with the testing methods.

11 You must participate in a mental health treatment  
12 program, and follow the rules and regulations of that  
13 program. The probation officer, in consultation with the  
14 treatment provider, will supervise your participation in the  
15 program.

16 Within 40 [sic] days of release from  
17 incarceration, you will appear before the Court for a  
18 re-entry progress hearing. The United States Probation  
19 Office in the district in which you are supervised will  
20 submit a progress report to the Court within 30 days of the  
21 commencement of supervision; and upon receipt of the  
22 progress report, the Court will determine if your appearance  
23 is required.

24 The Court finds you do not have the ability to pay  
25 a fine and therefore waives imposition of a fine in this case.

1           The financial obligations are immediately payable  
2     to: The Clerk of the Court for the U.S. District Court, 333  
3     Constitution Avenue Northwest, Washington, D.C. 20001.

4     Within 30 days of any change of address, you shall notify  
5     the Clerk of the Court of the change until such time as the  
6     financial obligation is paid in full.

7           The probation office shall release the presentence  
8     investigation report to all appropriate agencies, which  
9     includes the U.S. Probation Office in the approved district  
10    of residence in order to execute the sentence of the Court.  
11    Treatment agencies shall return the presentence report to  
12    the probation office upon the defendant's completion or  
13    termination from treatment.

14          Pursuant to 18 U.S.C. Section 3742, you have a  
15    right to appeal the sentence imposed by the Court. If you  
16    choose to appeal, you must file any appeal within 14 days  
17    after the Court enters judgment. If you are unable to  
18    afford the cost of an appeal, you may request permission  
19    from the Court to file an appeal without cost to you.

20          As defined in 28 U.S.C. Section 2255, you also  
21    have the right to challenge the conviction entered or  
22    sentence imposed if new and currently unavailable  
23    information becomes available to you or on a claim that you  
24    received ineffective assistance of counsel in entering a  
25    plea of guilty to the offense of conviction or in connection

1 with the sentencing.

2 Are there any objections to the sentence imposed  
3 not already noted on the record from the government?

4 MR. EDWARDS: No, Your Honor.

5 THE COURT: Mr. Matera?

6 MR. MATERA: No, Your Honor.

7 THE COURT: All right. You may be seated.

8 MR. MATERA: Judge, if I could just make a request  
9 that Your Honor is able to put a recommendation that any  
10 incarceration be close to his home?

11 THE COURT: And his home, which --

12 MR. MATERA: Long Island. I think New Jersey, maybe.

13 THE COURT: In New Jersey?

14 MR. MATERA: I think that may be the closest one.  
15 He's in -- Long Island, New York is where he resides. I  
16 think the closest one may be New Jersey.

17 THE COURT: Okay. Well, I will just ask for Long  
18 Island, New York. I will make that recommendation.

19 MR. MATERA: Sure.

20 THE COURT: All right. I am prepared to have --  
21 allow the defendant to self-surrender, but I want to give  
22 the government an opportunity to address that issue.

23 MR. EDWARDS: Your Honor, I believe -- it would be  
24 the government's request to defer to the Court. I wasn't  
25 sure if the Court has allowed for self-surrender, and so I

1 would just defer to the Court; but I would request that it  
2 be done so promptly.

3 THE COURT: All right. Well, if you have --

4 MR. EDWARDS: Frankly, I will state -- I mean, I  
5 think throughout these cases -- and I can check before I  
6 state this on the record. I think the government has  
7 allowed this. I don't want to overstep here and go against  
8 what we have done in past cases. I believe we have allowed  
9 the defendants to self-report.

10 THE COURT: Well, you don't allow; you make a  
11 request.

12 MR. EDWARDS: I apologize. Right.

13 THE COURT: And so I am just giving you an  
14 opportunity to make a request for -- if you are asking for  
15 him to be detained while he is being designated. But if you  
16 are not making that request, fine.

17 If you had made the request, to be honest, I  
18 probably would have overruled it; he has been doing fine on  
19 pretrial release. I don't see any reason to change that,  
20 and will allow him to self-surrender. Which I would presume  
21 would be Mr. Matera's request.

22 MR. MATERA: It would be, Your Honor.

23 THE COURT: All right. And I do not determine the  
24 time --

25 MR. EDWARDS: Right.

1           THE COURT:  -- while he is awaiting designation;  
2           that is up to the Bureau of Prisons.

3           MR. EDWARDS:  Okay.  Understood.

4           Thank you, Your Honor.

5           THE COURT:  All right.  So, Mr. Rubenacker, I will  
6           allow you to remain on release while you are awaiting  
7           designation by the Bureau of Prisons to the facility where  
8           you will serve your sentence of imprisonment.

9           I must caution you about your conduct while you  
10          are on release pending surrender.  You are required to  
11          appear to surrender for service of your sentence as directed  
12          by the probation department and the Bureau of Prisons.  
13          Failure to appear and surrender as required is a separate  
14          criminal offense for which you could be sentenced to  
15          imprisonment.

16          All the conditions on which you were released up  
17          until now continue to apply, and the penalties for violating  
18          those conditions can be severe.  If you fail to appear to  
19          surrender, you could be subject to a fine or imprisonment --  
20          an additional term of imprisonment that can be consecutive  
21          to the term of imprisonment to which you have already been  
22          sentenced today.  If you violate the conditions of your  
23          release, you may be subject to revocation of the release and  
24          a separate prosecution for contempt of court.

25          If you are convicted of an offense committed

1 newly -- a new offense committed while you are on release  
2 pending surrender, in addition to the sentence imposed for  
3 that offense, you may be sentenced to an additional  
4 consecutive term of imprisonment for committing a crime  
5 while on release.

6 Do you understand, Mr. Rubenacker?

7 THE DEFENDANT: Yes. I just have a question.

8 MR. MATERA: Ask me.

9 THE COURT: All right. If there is nothing  
10 further from the government today --

11 MR. EDWARDS: Nothing from the government, Your  
12 Honor.

13 THE COURT: And, Mr. Matera, anything further today?

14 MR. MATERA: Not at this time, Your Honor.

15 THE COURT: Thank you. You are all excused.

16 (Whereupon, the proceeding concludes, 2:09 p.m.)

17 **CERTIFICATE**

18 I, ELIZABETH SAINT-LOTH, RPR, FCRR, do hereby  
19 certify that the foregoing constitutes a true and accurate  
20 transcript of my stenographic notes, and is a full, true,  
and complete transcript of the proceedings to the best of my  
ability.

21 This certificate shall be considered null and void  
22 if the transcript is disassembled and/or photocopied in any  
23 manner by any party without authorization of the signatory  
below.

24 Dated this 7th day of June, 2022.

25 /s/ Elizabeth Saint-Loth, RPR, FCRR  
Official Court Reporter

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